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## Tuesday, April 29, 2014

## Chair

**Mr. Chris Warkentin**

# Standing Committee on Aboriginal Affairs and Northern Development

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● (1535)

[*English*]

**The Chair (Mr. Chris Warkentin (Peace River, CPC)):** I will call this meeting to order. This is the 21st meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Today we continue our study on the subject matter of wills and estates for first nations people living on reserve.

We have the privilege today of having Mr. Gailus back. Thanks so much for joining us. You seem to be our go-to guy on all things complicated, so thank you very much for being here. We'll be hearing from you first.

We have, from the Indigenous Bar Association, Mr. Roe and Ms. Richer. Thank you so much for being here. We'll hear from you after we hear from Mr. Gailus.

We'll hear from both groups, and then we'll turn it over to committee members for questions. We're trying to understand the matter of wills and estates for people living on reserve, and some of the complexities that go into those. We appreciate your being involved in our review.

We'll open it up for your opening statements. Then, as I said, we'll have some questions for you.

Mr. Gailus will start.

**Mr. John Gailus (Partner, Devlin Gailus Barristers and Solicitors):** Thank you, Mr. Chair. It's good to be back.

I want to thank you for inviting me here to talk about this really important topic. It is complex, and I know it's kind of a vexing issue for a number of first nations and first nations individuals.

Just by way of background, I'm a member of the Haida Nation in British Columbia. I'm also a practising lawyer. I've been practising in the aboriginal law area for the last 15 years throughout western Canada. Prior to that I spent four and a half years working for what was then the Department of Indian Affairs and Northern Development. I spent all of six weeks doing estates and got out of there and moved to lands for another four and a half years. But even working on lands, estate issues always seemed to pop up when we were trying to do economic development on reserve, and it still does today. As part of my practice I do some estates work. I have probably half a dozen files, complex files, usually involving land, usually involving leases of first nation land, so developments on reserve. I don't do any off-reserve estates work, just the on-reserve stuff, so hopefully I can give you a little bit of my knowledge in terms of ways to maybe improve the system.

What I want to talk about, and I want to be really brief on this, is sort of at a very high level, and this is really a question for the committee: what is the issue that needs to be resolved here? Is there a better way to address the wills and estates of status Indians who reside on reserve? I think the answer is yes, but the solution is not simple.

I think it was in February or March my colleagues here on the panel and I were invited here to Ottawa to a think tank that the department had put on to look at potential solutions. A number of solutions came out of that, so when I'm speaking of these solutions, I didn't come up with them myself. These were some solutions that the group as a whole came up with. It was good because we actually had representatives from the province, from the public guardian and trustee, and I was there representing the Canadian Bar Association. My friends here from the IBA were there, as well as people from the department who actually work on a day-to-day basis with these matters.

I think there are four possible responses. The first one is the status quo. I always give this to my clients when I'm giving them advice: do nothing. It's always an option. I'll leave that to my friends from AANDC to talk about. The second is moving to provincial jurisdiction. The third is the first nations control, first nations optional legislation, so something like we just saw recently with the Family Homes on Reserves and Matrimonial Interests or Rights Act. The fourth is amendments to the Indian Act and the Indian estate regulations.

As I said, I'm not going to address the status quo. I just want to point out some issues, though, that came up in terms of moving to provincial jurisdiction. As you're aware, the law is different from province to province. There are significant costs to retaining lawyers and court applications. The question you might want to answer is whether the process is going to be more efficient by moving to a provincial system. My experience is that it isn't. There are questions in terms of how the provincial law will intersect with the Indian Act lands provisions. One of the things that I learned from our think tank was that the public trustee actually charges to manage estates, so there may be a cost either to the individual first nations people or to the department if you decide that you want to move to a provincial system.

There were some submissions that the CBA aboriginal law subsection did on Bill C-428 that identifies some of these issues. I'd recommend them to the committee.

The second option would be moving to first nations jurisdiction. The question that I have is, and my friends probably might answer this, is this something that first nations want? Is this something that first nations should be exercising jurisdiction over? Unlike lands, estates are fundamentally personal matters. Any process would have to be adequately funded if first nations decided to take on this responsibility.

The fourth option would be amending the act and regulations. I think this should be seriously considered.

Much of the current process is policy driven rather than legislation and regulations. It's a fairly lean set of laws that you're dealing with, and there are a number of administrative gaps, as I would call them. One example is whether or not an administrator has to pass their accounts at the end of the administration of the estate. This is something that's required provincially under the Trustee Act, but it seems to depend, when you're talking to the folks at AANDC.

In British Columbia, where I reside and do most of my work, there's been a new act put in place just recently, as of March 31, called the Will, Estates and Succession Act. There are opportunities to look at other pieces of provincial legislation, and to, I'll use the word “cherry-pick”, from these various provincial legislative regimes to develop a comprehensive code.

Finally, I think any recommendations to make changes to the current system must consider: first of all, the constitutional responsibility of Canada under section 91, item 24; the costs that may be associated with individuals moving to a different system from the current system; the cost to the Government of Canada of change, for example, the need to enter into some sort of memorandum of understanding with the provinces for fee for services to manage these small-value estates that the public trustee is now going to be responsible for; whether making changes will lead to efficiencies in the management of these estates; and finally, the long-term cost to families and first nations of lands being tied up in estates.

Thank you.

● (1540)

**The Chair:** Thank you, Mr. Gailus.

We'll turn to Mr. Roe next.

**Mr. Brock A. F. Roe (Member, Board of Directors, Indigenous Bar Association in Canada):** Thank you, Mr. Chair.

I'm going to go first, and then my colleague, Ms. Richer, is going to speak, and then I'm going to finish off, if that's okay.

*Tansi,* everyone.

My name is Brock Roe. I'm an associate lawyer at the law firm of MacPherson Leslie and Tyerman, or MLT for short. I work out of the Edmonton, Alberta office, although I live in Saanich, B.C., just outside of Victoria, and I commute as required.

At MLT I work in a number of different practice areas. I mainly work with our partners in our aboriginal practice to support our clients in issues relating to band governance, corporate commercial economic development matters, business transactions, resource and regulatory matters, and consultation matters between first nations, resource sectors, and governments. I also support our partners with our non-aboriginal group of clients.

It's basically a general commercial practice that deals with everything: corporate law, corporate governance, commercial financing, business acquisitions and sales, and acting for non-profit societies. In other words, I'm a generalist, if you want to put it that way.

I have also had some experience working on a few estate matters on reserve for first nations ordinarily resident on reserve. I also have a little bit of experience working with regular estate matters off reserve for Albertans.

I'm also a member of the Bigstone Cree Nation, located in central northwestern Alberta. I grew up in Fort St. John, in northeastern B. C., so I have come to a unique off-reserve experience growing up, but being in close ties to my family on reserve.

I'm also a director and treasurer with the Indigenous Bar Association in Canada, also known as the IBA.

I want to be clear with the committee that my views expressed today are not reflective of the views of MLT or Treaty 8 or Bigstone, but these are the views of the IBA.

**Ms. Valerie Richer (Member, Board of Directors, Indigenous Bar Association in Canada):** Good afternoon. My name is Valerie Richer. I am an employee of the Canadian Human Rights Commission. However, I'm on a two-year interchange with the Assembly of First Nations and I serve as associate counsel there. However, I am here as a member of the Indigenous Bar Association, and I sit on the board. The comments that I'll be sharing today are on behalf of the IBA and are in no way connected to the commission or the AFN.

My background is in aboriginal law, human rights, and administrative law. In addition, I'm Anishinabe. I'm from a small community, Atikameksheng Anishnawbek, in northern Ontario, and I currently live in Ottawa.

The IBA is a non-profit professional association of first nation, Métis, and Inuit lawyers, legal academics, and law students in Canada. The objects, or purposes, of the IBA are as follows:

One, to recognize and respect the spiritual basis of our indigenous laws, customs, and traditions;

Two, to promote the advancement of legal and social justice for indigenous peoples in Canada;

Three, to promote the reform of policies and laws affecting indigenous peoples in Canada;

Four, to foster public awareness within the legal community, the indigenous community, and the general public in respect of legal and social issues of concern to indigenous peoples in Canada; and

Five, in pursuance of the foregoing, to provide a forum and network amongst indigenous lawyers: (a) to provide for their continuing education in respect of developments in indigenous law; (b) to exchange information and experiences with respect to the application of indigenous law; and (c) to discuss indigenous legal issues.

We would also like to make it very clear that the IBA has no mandate from any first nation in Canada to consult with the crown on their behalf on these issues. We simply appear before this committee as a type II Canada Corporations Act entity, i.e. a non-profit, governed by a board of directors who are elected by the members of our society, with the above objects or purposes in mind.

● (1545)

**Mr. Brock A. F. Roe:** Similar to my colleague, I'm going to make some remarks on a broader level on issues that we see and some things that should be addressed.

Because this committee is discussing how to deal with the administration of the estates of first nations, i.e., the stuff that indigenous people possess and own, meaningful consultation obviously needs to take place with first nations on any changes that are desired, keeping in mind those objects that Ms. Richer just reiterated. It's important to remember that first nations in Canada have their own indigenous legal orders as well.

It's also important to remember that those first nations have been dealing with property of their own for a very long time. If we want to consider making changes to how a deceased first nations person's possessions are to be dealt with in Canada, then we need to consider how indigenous peoples in Canada already have been dealing with their property in the past, according to their own legal orders, how they can deal and are dealing with it now, and how that work can be supported by Parliament with sufficient resources.

Also, let us remember that the relationships between the crown and a large number of first nations in Canada are based on treaty. Do not be surprised when engaging on these issues if first nations come to it from a treaty perspective. For those first nations who have no treaty with the crown, be prepared to engage in a process from an aboriginal rights perspective, right? Those are two very different frames of mind.

We also understand that previously, under MP Rob Clarke's private member's bill, Bill C-428, a number of antiquated sections were removed, more or less, from the Indian Act. Subsequently, certain sections within the bill relating to wills and estates were then removed from the bill, so here we are today discussing these same sections, the wills and estates sections.

Before we get into a dialogue, I also want to highlight some important concepts and issues or items that ought to be considered in any type of amendments going forward. These are sporadic, by the way. I tried to organize them into some meaningful sense, but wills and estates are complicated and encapsulate a large area of law jurisdiction. I tried to filter it into some type of organizational paradigm.

One is the concept of “ordinarily resident on reserve”. It's not just on reserve. Even the “Decedent Estates Procedures Manual” acknowledges this, but this is the guide that the bureaucrats in AANDC use to help themselves when they administer these estates. It also refers to first nations who are on crown land, National Defence land, provincial parkland, national parks, and lands bought by the federal crown for first nations that don't have reserve status. Keep in mind that there are other people who are captured in this, not just people on reserve. In Alberta, there's a group of people living on crown land in the mountains, on the eastern slopes, in the Smallboy camp. That's an example.

Two is dispute resolution. This was discussed on April 8 before this committee as well, in a cursory context. The minister, or AANDC, doesn't have the administrative tool to deal with contentious estates. If some change is desired, consider talking with first nations to see what sorts of ideas they might come up with to deal with dispute resolution. They know their community best, so they would have a good idea of how to deal with contentious matters. Also, you can't just dump another administrative process onto first nations who are already dealing with estates matters. I think those processes need to be supported adequately with resources.

In regard to intestate thresholds, under the intestate provisions of various provincial regimes, there is a threshold dollar amount. The first dollar value would go to the spouse. Afterwards, any remaining value would be split up between the children and the spouse, or however the formula is set out. Currently under the Indian Act that threshold is $75,000. In Alberta it was $40,000 until it was recently amended up to $150,000 in new legislation. I'm not sure about B.C. In Ontario I understand it's $200,000. There's a disparity there that we need to consider. I've just been told that it's $300,000 in B.C.

There's a significant difference. We need to consider why there's a difference. Again, it's pretty obvious. Provinces can't deal with possessory interests in reserve lands, right? That's in sections 91 and 92, ultra vires, intra vires, and we have to keep that in mind.

There's also clarity. You can't simply enact a regime where the federal law applies in one context of the administration of estates and then provincial law comes in for another.

● (1550)

I'm trying to think, if a client came to me with a complex matter that considered both of those jurisdictions and the advice I needed to give, I'd have to research both areas of law and put together advice. I can tell you that would cost a lot of money, more than if it was under one regime or the other, simply where there is already an existing body of case law for both.

Regarding family administrators, you will recall previous evidence from Mr. Gray on April 8, that approximately 20% of estates are handled by AANDC administrators, the balance being handled by appointment of family administrators.

We're concerned that AANDC would look at these family administrators with potential liability for any decisions these family administrators make, and AANDC might distance themselves from these family administrators in order to protect themselves from liability.

The family administrators are then kind of left to their own devices to deal with decision-making, and they undergo a steep learning curve just as lawyers do. We need to consider that, and we need to support them in their decision-making, and make sure they have clear guidelines. Otherwise estates matters aren't going to be helped or dealt with.

Next are the provincial government administrators. This was new, and I never knew this before, but on April 8 it was either Mr. Gray or Mr. Saranchuk who said that there are contracts with two provincial governments regarding their administration of estates files.

This was kind of interesting. I thought maybe individuals who are administering those contracts should be brought before committee to discuss how they think it's going, if there's anything they can improve, the same as first nations who are being dealt with under that contract.

There was a comment about regional disparities at the last meeting here as well. AANDC has about a 20% departmental administration take-up. When you break that up across the country, there was serious regional disparity between B.C. and Alberta, for instance. From what I understand, nobody really understood why when I looked at the transcript from the last meeting. So here are my thoughts on that, and this is based on our discussions from the think tank discussion group we had previously.

One, you have to look at how legally recognized possessory interests in reserve land are spread out across the country. In B.C., there are a lot more certificates of possession or certificates of occupancy that are issued, which we can otherwise call lawful possessory interests. In Alberta there are significantly less, so upon someone's death, you're going to be dealing with a lot less than if you were in B.C.

B.C. also has a treaty process that a number of first nations are engaged in. This triggers a lot of people needing to consider all of the outstanding estates because there are outstanding interests in reserve land that need to be taken care of.

Some nations are also considering whether to adopt the First Nations Land Management Act. Again, there are a number of outstanding interests in reserve land that need to be dealt with.

You can think about, if you're going to sell your house on regular titled land, you have a mortgage on title, maybe there's a certificate of *lis pendens* or some type of writ on your title. Before you sell that to the next person, you need to deal with those outstanding interests on title.

There's the same kind of idea or concept with reserve lands. Before that transfer of land occurs under a treaty or self-government agreement or under FNLMA, you need to deal with all of these outstanding interests in reserve land. So in B.C. you're going to have a pile of certificates of possession that are issued. There are a lot of old estates files that are taking a long time to deal with. I think in B. C. you're going to see more of that than in, say, Alberta just because of those processes.

I think that can explain why there's some regional disparity between the provinces.

In regard to holograph wills, these are rather easy to prepare. The concept is that you take a pen and write down your intentions on what you want to do with your stuff upon your death. As long as it's clear, and you clearly write out your property and your intentions with that, and it's your own signature in your own writing, it's usually non-contentious.

Under the Indian Act provisions under their will making, that's roughly the criteria. There is a set criteria that Mr. Gray and Mr. Saranchuk discussed at the last committee meeting.

If you have this provision of providing a means for a holograph will to be prepared by first nation individuals on reserve, and you replace it with a requirement for a formal will, we're concerned in that what you're saying is that instead of writing something in your own hand that you can do on the reserve with some limited guidance, you're going to need to seek legal counsel on how to prepare a will.

● (1555)

A will is a very different document from a holograph will, and there are certain formalities that need to be addressed. You can't have a beneficiary in your will as a witness to your will. That's going to be tough, because you have to educate everybody. For instance, you trust your sister a lot perhaps because she takes care of a lot of your family's business, but if you also want her to have something, then she can't witness your will, but you want her to help you prepare it.

You're also probably going to want to seek advice on whether or not your bequests or the testamentary dispositions in your will would be valid under your will. For transferring reserve land, if you have a valid lawful possessor interest, like a certificate of possession, you'll want to account for that in your will and transfer it.

There is a concept of something called a buckshee lease, which is what we'll call an unrecognized interest in reserve land, which isn't formally recognized. A lot of first nations live in a trailer in which the family has lived for a long time and everyone knows that they live on a certain piece of land. We can call that an interest, but in terms of the Indian Act, it's not recognized and it's an unrecognized lawful interest. When the individual living in the mobile home on that spot drafts a will, can they actually transfer that spot to someone else? This is something that needs to be addressed in the Indian Act, because there are a lot of interests like this out there.

I would say you need a lot of input from first nations on how that needs to be dealt with, because it's not simply inserting a title regime. There are lots of questions about that because of the collective nature of reserve lands.

Concerning probate, if you want to draft a will, you have to take it to probate and you have to have it approved by a court. If you live on a reserve three hours away, you may have to drive to a courthouse or somewhere to get the information, or maybe you're lucky and you have Internet and you can print it off and deal with it then. You're going to have to pay probate fees. You're probably going to have to seek legal help or legal information of some sort.

I don't know if somebody living on reserve can seek legal aid and whether they're going to meet the threshold requirements for legal aid in the provinces, and as we all know, across the country their budgets have been cut.

As well, what do we do with the 8% of people who have wills already? That was discussed as well. If 8% of first nations people living on reserve are drafting wills and we do something new, is there going to be something provided in any act or wherever that would account for those existing wills? Will those old holograph wills be grandfathered or are we going to require them to get legal advice and draft something new? Those people are going to be hard to find. You have to talk to them and say, "You need to reconsider all this. You can't give that away in that manner. We have to deal with it in a different way."

Regarding public guardians and trustees, my understanding, based on a think tank discussion group at which we had three public guardians and trustees from Saskatchewan, Ontario, and British Columbia, is that they don't have the current administrative knowledge or expertise with respect to first nations issues on reserve. Some have an idea. There is a body of some case law on it, but not a lot, that they can learn from. They don't have that knowledge, nor do they have the budget to deal with this.

If you want to think about transferring any authority to the provinces to deal with these estates, think about those 3,600 open case files right now and just transferring them over to the provinces. Think of the administrative bureaucratic exercise that goes into saying that one group is in, or that somebody has to deal with the B. C. group because there are a lot more and they will have to have more staff on that. In Alberta, Saskatchewan, the territories, and across the country, it would be the same thing.

Those are just some things to keep in mind, because it seems to be a relatively easy process, but it's actually quite complicated and it's going to take a lot.

Those are my comments.

**The Vice-Chair (Ms. Jean Crowder (Nanaimo—Cowichan, NDP)):** I want to thank the witnesses very much.

We'll now go to our rounds of questioning.

We'll start with Mr. Genest-Jourdain, for seven minutes, and that includes responses as well.

● (1600)

[*Translation*]

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

I believe I understood that you work in private practice in British Columbia and that you also deal with estate files on a regular basis at your firm. Is that correct?

[*English*]

**Mr. John Gailus:** Yes.

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** According to your expertise and the particular situation in British Columbia, Mr. Gailus, what are the usual costs for a third party to administer an *ab intestat* estate, whether we are talking about aboriginal persons, or citizens of British Columbia in general?

Since you handle that type of case, would you have a figure in mind that would correspond to the usual amount that could be charged to settle or administer an estate?

[*English*]

**Mr. John Gailus:** Would that be on reserve?

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** Generally, yes. What would be the cost to settle an estate on a reserve, from A to Z? If a third party does the distribution, what would the normal cost be for that? I heard $300,000 mentioned earlier. You mentioned amounts.

[*English*]

**Mr. John Gailus:** The $300,000 reference was to the amount that a spouse would be entitled to under the new B.C. act. The surviving spouse would get the first $300,000 of the estate, and then it would go down from there, to the children and next of kin.

It's hard to ballpark, frankly, what it might cost to do. I think the translation was "liquidation", but I think you're talking about a distribution of the estates. The ones that I'm involved in usually involve real property as well as assets.

Most first nations estates usually don't have very much value and, to be honest, they really can't afford to retain a lawyer to deal with it. It seems that the ones I'm involved in often also have a mix of members and non-members, so we have that section 50 rearing its ugly head. We have individuals who can't inherit the estate. In those circumstances, there's a lot of discussion that goes on with the department to see whether it's going to be necessary to do a section 50 sale or not.

Recently, the fees associated with just getting a new administrator appointed, and this was an estate that had been transferred, the jurisdiction had been transferred from the minister to the court, under section 44, I believe it is. The minister said, "Well, this is too complicated. I'm going to transfer my jurisdiction to the court". The fees associated with that were in the area of $25,000, but there was some dispute involved in terms of who wanted to be the administrator there.

I think with the costs, whether you're dealing with on reserve or off reserve, if there's some value in the estate, you're going to need to retain lawyers. Oftentimes, you have beneficiaries who also have their own lawyers, so the costs can escalate quite quickly.

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** I understood that you have also worked with Aboriginal Affairs and Northern Development Canada on estates-related matters. To your knowledge, has the department ever provided figures on the cost to the department of administering estates? Internally, what are the amounts for that?

You spoke about $25,000 in the civil area. If the department did this, to your knowledge, have these figures ever been drawn to public attention before?

[*English*]

**Mr. John Gailus:** Would this be a circumstance where the department is administering the estate?

● (1605)

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** Yes.

[*English*]

**Mr. John Gailus:** My understanding is that there's no fee charged for doing that. That might be a better question for somebody from the department, whether or not they've actually quantified what that cost might be for departmental administration.

I know that some of the complex or older estates, where there is no one who is willing to step forward, if you priced it out, it would be my guess that it would be a significant sum of money in terms of the amount of time that the estates officers are dealing with these estates.

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** You also referred to the responsibility of the state. To my mind you were talking about the concept of fiduciary relationships.

According to you, Mr. Gailus, the administration of wills and estates by Aboriginal Affairs and Northern Development Canada is covered by this notion of the fiduciary responsibility of the Crown for first nations. Could wills and estates really be included in that, in the final analysis?

[*English*]

**Mr. John Gailus:** In terms of the trustee's duties, yes. If a departmental representative is managing the estate, they're in the same position as Canada Trust, for instance, or a family member, in terms of their fiduciary duties to manage the estate.

Certainly there are potential liabilities if the administrator is negligent or breaches their fiduciary duty in handling the estate.

[*Translation*]

**Mr. Jonathan Genest-Jourdain:** Thank you.

Mr. Chair, I'm going to share my speaking time with my colleague.

[*English*]

**The Chair:** Ms. Crowder.

**Ms. Jean Crowder:** I have only a minute and a half so I'll follow up with the rest of my questions on my second round, but I want to come back to a point.

Mr. Gailus, in your opening remarks you indicated the issue that needs to be resolved. I think that's a challenge for the committee because it's a complex matter.

If the committee could recommend one simple thing, what would it be?

**Mr. John Gailus:** One simple thing....

**Ms. Jean Crowder:** I looked at the program evaluation that was done, the internal evaluation, which identified a couple of key areas where the department was not fulfilling its responsibilities. For example, they weren't adequately monitoring third party administrators. There was insufficient information. There were lengthy periods of time between when a person passed away and the department was notified. There were a number of departmental inefficiencies.

Would that be one thing that we could at least do?

**Mr. John Gailus:** Absolutely. As I said, both the legislation and the regulations are pretty lean and there are some huge holes in there. Oftentimes, you're left with policy to try to fill those gaps and even the policy often doesn't address all of those issues.

My guess is that the policy may not be applied in the same way across the board. I suggest that an option was to take a really hard look at the act and the regulations and determine whether it would be worthwhile to do a comprehensive code. That is what you would have if we were under a provincial system where you go to the act, the act says what it is you have to do, these are your responsibilities, and you can get on with it, rather than it seems oftentimes to be very ad hoc when you have an issue.

We had an issue recently. We tried to remove an administrator who had been appointed by the department. No one in my office could actually find the form or the process by which that person could be removed. I said to just write a letter to whoever the regional manager of estates is, and say that we want the guy removed and give the reasons why.

In some cases, there is a lack of formality when we as lawyers are trying to figure out how to manoeuvre through it.

The simple answer is to throw more resources at it, but I don't think that is the solution.

**Ms. Jean Crowder:** Great, thanks. I will have a follow-up question in the next round.

**The Chair:** Thank you.

Mr. Clarke, go ahead.

**Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC):** Thank you to the witnesses for coming in today to talk about wills and estates and also about the Indian Act.

Just to spin off what Ms. Crowder was saying, what would be your recommendations to fix wills and estates? I have one good idea: scrap the entire Indian Act and draft all new legislation. We know that probably won't happen in our lifetime because we see the Indian Act as building an empire in itself through Aboriginal Affairs.

One of the interesting parts of your testimony here was you talked about policy, and in the Indian Act itself, regarding wills and estates. Now, what you are saying is that the wills and estates section of the Indian Act basically supersedes a treaty signed way back in the early years of Confederation.

I would like some clarification on the policy aspect. You say that with wills and estates, the policy is basically a guideline. Is there nothing concrete in that? Is the department basically following policy and not regulations?

My question is for whoever can answer it.

● (1610)

**Mr. John Gailus:** No, the fact is, though, there are seven sections dealing with estates and then you have the regulations which are kind of all over the place. When you read them, there doesn't seem to be a really comprehensive code, so you do fall back on policy. Policy implies discretion is what I always say.

**Mr. Rob Clarke:** It's like common sense. We're seeing some first nation communities...I'm not sure if you're aware about Cree law where that very issue for wills and estates is being addressed. Are you familiar with that?

**Mr. John Gailus:** No, I'm not.

**Mr. Rob Clarke:** When we're also talking about the administrative gaps under the Trustee Act that you were mentioning, one thing that really caught my attention was that contracts were being offered to the federal government to administer the wills and estates for individuals. Is that correct?

**Mr. Brock A. F. Roe:** That was a comment that I made. I was actually just referring to the previous evidence from Mr. Gray or Mr. Saranchuk on April 8. What they were saying was that AANDC has a contract with two provincial governments to administer this section of the Indian Act. I didn't even know that and I didn't even know what provinces they were because they didn't disclose that. I thought it would be interesting to hear what their perspective was and the first nations that are under that.

**Mr. Rob Clarke:** Sitting here providing this testimony and coming from first nations background, do you think there are two different laws that govern Canadians on wills and estates? Is it a double standard?

**Mr. Brock A. F. Roe:** I'm sorry, I don't understand.

**Mr. Rob Clarke:** Do you feel you have the same rights as every other Canadian, or is your life dictated by the Indian Act?

**Mr. Brock A. F. Roe:** If it's not dictated by the Indian Act, by the minister, then it's dictated under provincial law by another minister under that act, so if we're not talking about the Indian Act and the minister of Indian affairs, then we're talking about the responsible minister in Alberta or B.C. for the wills and estates act, in my mind. I think there's more of a discretionary component, though, to the Indian Act than there certainly is to the wills and estates act in the province. The province I think has a more current will and estates act than what the Indian Act provides.

**Mr. Rob Clarke:** Realistically, the first nations are governed by two acts or two pieces of legislation—provincial and federal jurisdictions, where most Canadians are not.

**Mr. Brock A. F. Roe:** Depending if you're on crown land or not, essentially....

**Mr. Rob Clarke:** You mentioned the length of time for wills to be administered. What is an average time frame for non-aboriginal, and the average for an aboriginal or first nations?

**Mr. Brock A. F. Roe:** Do you mean to have it approved and then probated and then...?

**Mr. Rob Clarke:** Yes, from the onset of an estate being administered until completion. What is the time frame?

**Mr. Brock A. F. Roe:** The last firm that I worked with, I was working on a matter with a contentious estate with a significant dollar value and it was for somebody that lived off reserve. That never got resolved during my time at that firm of two and a half years, and then when I came to the new firm, the same thing happened. I was put on a file which dealt with just one aspect of an estate matter, not the whole probate issue and whatnot. That took two years. That was a very litigious aspect. In terms of just a regular application under that act, I couldn't tell you because I've never actually dealt with one.

The same goes for first nations on reserve. The few matters that I've had to do research on, as far as I'm concerned, those are still open matters and that's about a year and a half already. That's just on one issue with respect to the estate administration. Those are contentious matters. They're being litigated, so necessarily, that's going to slow things down. As for just regular cases, I have no idea.

● (1615)

**Mr. Rob Clarke:** Through the litigation process, are you finding any hurdles you have to jump through, through the department, or get approval through the department bureaucracy?

**Mr. Brock A. F. Roe:** In Alberta I was able to call whoever was appointed to deal with the matter relatively quickly and talk with them. I didn't think the conversation was satisfactory in my humble opinion. I was able to have a discussion on what they thought about the issue. I thought that was a little bit more frank, to be honest, than going through legal counsel on the other side and trying to figure out what they think their client says and getting back to instructions. It was a unique aspect.

I can't really say in terms of a regular file what that would look like. Sorry.

**Mr. Rob Clarke:** What I've heard from individuals here in committee is that there doesn't seem to be a problem, and just maintain the status quo. I don't think that's the right approach to effect change.

We talked about your four components. One of them was the status quo. We know the status quo doesn't work, and first nations are progressing further. Some of the areas or communities in first nations territories, they're doing self-government now through treaty.

Do you feel that might be an approach to be looked at for wills and estates? What are your recommendations to effectively change the Indian Act for wills and estates? What would be an effective means to look at this and make a change, a positive change?

**Mr. Brock A. F. Roe:** We don't know what first nations want. I can only give you what we think and that's why we're here.

The provisions that deal with wills and estates are old and outdated. I think that's what you're getting at.

The problem is they're not really current. Like other jurisdictions, they have looked at their wills and estates acts, intestate succession acts, and modernized them, if you will. They've dealt with all sorts of new issues that come up, like dealing with common-law spouses, same-sex marriages, whatever.

I think you can look at those issues, and try and accommodate those into any changes that you want to make. You might want to look at clarifying the rules on appointment of family members as administrators. I don't want to say make it look like a provincial process, but I think you can definitely look at some lessons learned across the provinces on what they have been doing and see some areas that they said we need improvement on and do that.

It's also important to actually get some opinion from the public guardians and trustees because they had a certain idea for how things should be handled for people and for things that kind of fell through the cracks jurisdictionally, that fell on their laps that they had to deal with.

**Ms. Valerie Richer:** May I add something to that response?

**The Chair:** Yes, absolutely.

**Ms. Valerie Richer:** I was struck by reading the testimony of the April 8 meeting, wherein it was reported that 92% of people passed away on reserve intestate, so only 8% had wills. Yet, there was a really small number of disputes that came forward to be settled.

It struck me that, obviously, first nations are dealing with this issue because if there is a small number of disputes and there's a small number of wills, they are being handled internally. If you're going to cherry-pick from a process, we should be cherry-picking from those processes that are working in first nations communities and looking at self-community autonomy in determining their own laws. Wills and estates would be one place to start that.

**The Chair:** Thank you.

We'll turn to Ms. Bennett.

**Hon. Carolyn Bennett (St. Paul's, Lib.):** Again, I think the committee was pretty clear that the status quo is not okay, but what was attempted would have a whole bunch of unintended consequences. If you were writing the report for the committee, what would you be suggesting should be in our recommendations?

● (1620)

**Mr. Brock A. F. Roe:** I think you can get input from your own staff on where they see gaps in their process, because they're going to have complaints coming at them on a number of issues. Externally I think you need to talk with first nations, however you devise that process, and figure out where they think that improvement can be made. If they want to do this from a regional approach, then have tribal councils deal with this. That is something they might want to consider. They might want to simply use a mediator of some sort, or an arbitration process, or deal with their own process if they have an existing indigenous legal order to deal with property that is passed on through their families or members of their first nation.

What that is saying is you're going to need to get some input externally on what should happen. It's tough because Canada is a big country and there are 630-odd first nations that might want to have some input.

I remember, too, that there was a comment from the think tank discussion group. I think it was the regional manager of estates for B. C. who mentioned that. I wasn't sure how to take her comment, but she said there was not a lot of uptake on first nations in B.C. for wanting to take on this jurisdiction. She said in treaties that have been negotiated in self-government agreements, when it comes to wills and estates, they'll defer to the existing sections of the Indian Act. It would be interesting to talk with those first nations that deal with that to ask why, and if they wanted to deal with it, what would they want to do? If you're talking with nations that are close to coming to an agreement or a treaty, broach the subject with them to find out what they want to do with this area. Ask them if you should draft something specifically for them. Then they can let you know if it works for them.

I'm sorry I don't have an answer in terms of sections and whatnot to repeat because that's not going to happen.

**Hon. Carolyn Bennett:** No, but it's just a matter that until the Indian Act is gone there needs to be some improvement. I think that's what the committee is being asked to have a look at. What are you suggesting we say?

**Mr. Brock A. F. Roe:** My comment is you are going to need to engage in some type of a consultation regime just to get an idea from first nations people about what they think is wrong with it externally.

**Hon. Carolyn Bennett:** Meaning that Canada needs to.

**Mr. Brock A. F. Roe:** Yes, absolutely.

**Hon. Carolyn Bennett:** It shouldn't really be a parliamentary process. It should be Canada consulting with first nations, right?

**Mr. Brock A. F. Roe:** Yes, and when you do that you're going to get some idea of the interest and uptake on whether or not first nations actually want to do anything about it, and if there's enough resources for them to do it, because there is a lot on their plates every day.

**Mr. John Gailus:** I don't think there is a silver bullet. As Brock mentioned, in the B.C. Treaty Commission process, the first nations that have negotiated treaties are just relying on provincial laws, so they don't seem that interested in it at this point. Those negotiations will go on and on for quite some time, as I'm sure this committee is aware.

I agree with Brock that there needs to be a broad consultation, and certainly, if there's going to be a move to bring in provincial law for instance, you need to sit down with the provincial people as well, the public guardians and trustees, which was in my opening remarks. But in the interim, you are right in that there is room for improvement. I think the approach is not simply to throw the baby out with the bathwater. There are actually, as Brock mentioned, some good things in the act, some efficiencies that come from things like holograph wills. The minister can actually move quite quickly to approve wills and appoint executors and administrators, way quicker than the court process. I've seen in my experience that you don't have to wait even weeks for an approval of a will and get an executor or executrix appointed to get on with managing the estate.

There are actually some good things there. The fact is that, as Brock mentioned, you are going to have to get an approval from somebody. It's either going to be a judge in the court or a person sitting in the regional office at AANDC signing off on it. I don't think it's a question of autonomy per se.

For this committee, I think you need to move slowly, actually, and consult widely. Perhaps until there is that silver bullet, you need to proceed incrementally to make changes to the act and the regulations until such time as the Government of Canada decides to get out of this business.

● (1625)

**Ms. Valerie Richer:** I'll just add that I'm not sure whether you've heard directly from first nations people yet and their leadership, but I would suggest that it happen. Doing things for the benefit of first nations people without having first nations people at the table is something of the past that we shouldn't really be repeating.

I heard some numbers, that currently the wills and estates program through AANDC is spending $3.5 million and has something like 44 staff. With those kinds of resources, I can imagine the amount of work that first nations communities can get done. The first nations bureaucracy has been cut drastically in the last few years, and so they're very burdened. I can imagine that these kinds of resources could go a long way towards dealing with wills and estates.

I think the committee could do a full analysis that involves first nations people and is led by first nations people.

**The Chair:** Thank you very much.

We'll go to Mr. Strahl now for the next questions.

**Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC):** I'd like to thank you for giving me many more questions today than I had at the start of this.

I guess my fundamental question—and I asked a variant of it to the officials—is whether this change or modernization or some improvement to the wills and estates regime.... Are you hearing a call for this coming from grassroots first nations people or chiefs in council? Or is it something that has been examined and about which it is said to be something we could get out of the Indian Act and that therefore, because we discovered there are two different ways of doing it, there is reason enough to remove it or change it?

Whoever wants to answer this, all or a couple of you, may.

Is this something that first nations communities have said they don't want to...? You said there hasn't been uptake in B.C., but is there a groundswell for this on any level? We have made changes before to the elections act for first nations elections, when a couple of groups said they wanted to change it and we said, “Okay, here's some opt-in legislation”. Is there something similar out there? Are there groups calling for this?

**Mr. Brock A. F. Roe:** There are two avenues by which I see this coming. One involves the clients we have who have to deal with these matters on reserve. I can't breach solicitor-client confidentiality, obviously, but this is the way I see the issue come in. I try to analyze it with the facts and I go to look at the law, as a typical lawyer would do, and I become frustrated. I look at the antiquated provisions and I say that there's no answer here for me, that I have to look at this and be creative. And lawyers will be creative; that's how you develop the common law around a subject. But it's incredibly frustrating. You're walking on eggshells, because you don't know whether a particular area has been proven or not, or whether it's going to be accepted by the judge, or whether the clients will like the advice you can give them.

That was one avenue. The other avenue on this.... I had no idea about this process until, actually, I heard about Mr. Clarke's private member's bill wanting to change certain portions of the Indian Act by taking out antiquated provisions. I had only printed if off—I think it was a year ago or so—and taken a very quick skim of it and said, “Oh, there's the wills and estates in there.” I remember thinking at the time—it was at about the same time the other matter I was dealing with at work came up—that I didn't think this was going to work, because if you're taking those provisions out, what is left in their place to deal with the possessory interests of the reserve land? That thought was similar to what Christopher Devlin, Mr. Gailus' partner in his law firm, provided in his report when this committee was studying Bill C-428.

● (1630)

**Mr. Mark Strahl:** Thanks.

Mr. Gailus, I believe you said there's room for improvement, and I think Mr. Roe would agree. You've been asked this a few times, but I'm trying to get a better grasp of it. What form do you think that should take? Is legislative change necessary? Is regulatory change sufficient? Is a modern....?

We walked through it all here. There's no quick simple fix, and as Ms. Richer has said, until the consultation process is engaged you probably shouldn't do anything. I think we can all agree on there being room for improvement, but as Carolyn was asking, how do you get there? What is the first step? Are there things that can be done without major legislative change that would be acceptable in order to move forward, or is the recommendation really that we start a national conversation with first nations on this issue?

You're not supposed to ask a question you don't know the answer to, but there it is.

**Mr. John Gailus:** Only when you're a lawyer.

It could take many forms. I think there is certainly room for policy improvement at the department now. There are the regulations. It's a lot easier to change the regulations than it is to change the act itself. The regulations certainly could be brought up to date and refined. I think you do need to start at the grassroots. You need to consult widely if you're going to make any of those sorts of changes. I think the first step is maybe, when I went back to it, defining what the problem is and putting forward some potential solutions to it, but in a very broad-brush way, and going out and consulting, and talking to the people who work in the department, talking to first nations, and getting a sense of whether any of this is going to fly.

**Mr. Mark Strahl:** I'm not convinced. We have yet to really define what the problem is. We're going round and round. There are problems that it's not modern, that there are antiquated provisions, that there are gaps. I think that's where we have to wrestle this thing to the ground almost as a committee, and keep coming back to that. Perhaps I'm just not grasping it entirely, or I'm not legally trained to grasp it. Are there papers that we should be consulting that lay these things out: here are the specific problems that someone should address in some way? We're kind of broad-stroking it here and I'm trying to get maybe a little more specific.

**Mr. John Gailus:** There's a paper I did back in 2010, which was a presentation to the CBA wills and trusts subsection. I reviewed it again this morning. It's a great paper—

**Some hon. members:** Oh, oh!

**Mr. John Gailus:** —that really sets out, I think even for lay people, the framework that we're in right now. I think that might assist the committee. It's there already.

**An hon. member:** Fantastic.

**Mr. John Gailus:** I could probably come up with a list of the top 10 things that need to be changed if you want me to do that, but it won't be as entertaining as Letterman's.

One thing that comes to mind, for instance, is that when you're dealing with estates, particularly intestacies, it's not necessarily that these estates are being resolved; they're just not being dealt with. Then it becomes a point in time when somebody, the grandchild, comes around and is on the certificate of possession land and says, "I wouldn't mind getting the certificate of possession of this land," and then goes back and says, "Grandpa passed away and nobody ever dealt with his estate, and Mom and Dad passed away and nobody dealt with their estates."

Now you have 20 to 30 potential heirs who are going to get this fractional interest in the land, and it's all undivided interest, and so one of the problems you face with these estates is trying to get everyone to agree to transfer the land. Or you have this infighting going on, or if it finally comes to a situation where the land does get transferred and we have 30 people, then they all have to agree if they want to develop that land. So opportunities pass by, because essentially any one of those 30 people has a veto.

One of the things that's missing in the current regime is the ability to actually go to the court and say, "I want an order of partition and sale," which is something you wouldn't have. You would have offers, so that if you can't come to a conclusion, you can actually deal with the land and get on with it. That's one example of something legislatively that could be changed in updating the acts to allow these deadlocks to be broken.

I have three of these files right now, where I have these fractional interests and essentially it's only one twenty-fifth in this case, but essentially they're holding the other beneficiaries hostage on the distribution.

● (1635)

**The Chair:** Thank you.

We'll turn to Ms. Crowder.

**Ms. Jean Crowder:** I'll try to do a recap here.

First of all, we have complex land issues that don't exist in provincial jurisdictions, which you've rightly pointed out, Mr. Gailus. I've read your paper and of course previous testimony. The land study we previously did identified those complex issues as well. So we have that piece, which we can't disregard.

The second piece we have that we can't disregard is there are different statuses on reserves. There are people who are ordinarily resident on reserve, yet who do not meet the criteria for being status on reserve due to second generation cut-off, or whatever that might look like. People may be subject to a section 50 sale even though they are a community member. There's that piece.

Ms. Richer, you pointed out, quite rightly, that no major changes should be made unless the duty to consult is fulfilled, as has been laid out in any number of decisions. To my understanding, it's in that kind of context that we're dealing with this.

Then I come down to a couple of pieces which I think the committee could still look at.

First of all, are there any first nations who are currently exercising jurisdiction with regard to wills and estates? I don't know that we know of any, but it would be interesting for us to talk to first nations who have decided to exercise that jurisdiction.

Second, I think I heard you say, Mr. Roe, that it would be useful for the committee to hear from the two provinces that have a contract with AANDC and to hear from some public trustees about their perspective.

Then I'm sort of making a leap here. This is my bugaboo, but I'm also thinking that because the department did an internal evaluation on some problems with internal processes, it would be useful to get a report out from the department about what they're doing to fix their own problems internally. Next, they could tighten up policy and process without any kind of legislative change. If you can't find forms, if people aren't clear, whatever that looks like, there should be a clear process that is applicable across Canada with regard to how wills and estates are handled by the department.

On the dispute resolution piece, the Canadian Human Rights Commission has a very good framework for communities to develop dispute resolution. I'm understanding Ms. Richer to say that it doesn't appear to be a problem, but there are mechanisms out there for dispute resolution processes that could be adopted.

Finally, without getting into major legislative change, there could be an examination of the regulatory process to see if those could be cleaned up and modernized in the context of what some provincial governments have looked at in terms of modernization.

Have I got it? Have I kind of summarized some of the key points?

Mr. Roe did a very good job outlining a whole list of things that I haven't even gone there on yet, but I'm just thinking of terms of where this committee goes with this next. There are some things that we could hear from future witnesses, but then there are some things that we could make recommendations on in this regard without wholesale change to the current act, given the complexity of this, to allow a fulsome process to go forward. In the meantime we could clean up some things that would make people's lives easier while that fulsome process went forward.

Do you have any comments on that? Are there no big, glaring errors?

**Mr. Brock A. F. Roe:** Sorry, I'm just reviewing my notes.

**Ms. Jean Crowder:** That's okay.

● (1640)

**Mr. John Gailus:** No, I think you put it very well.

**Ms. Jean Crowder:** Okay. That's all I had to say, unless you have a comment, Mr. Roe, after looking at your notes.

**Mr. Brock A. F. Roe:** No.

**Ms. Jean Crowder:** As you can tell, we're struggling with this matter, because it is complicated. We haven't had people pounding down our doors saying that we have to fix this. If we're going to expend time and energy and effort, let's make sure it's meaningful in terms of the change and that it doesn't create more difficulties for first nations with regard to additional costs, additional complexities, and all those kinds of things. I think we have to keep that in mind as well.

Thank you for your time.

**The Chair:** Thank you.

We'll turn to Mr. Dreeshen now.

**Mr. Earl Dreeshen (Red Deer, CPC):** Mr. Gailus, you mentioned something earlier on in your testimony about some of the complex files you're looking at. Specifically they were leases on first nation land, or at least that was one of the items.

Since we'll have to take a look at all aspects of this, I'm just wondering if you could run us through what you think are some of the issues associated with the leases that might be there, just so that I can get an idea of what it was you were speaking about at the time.

**Mr. John Gailus:** In his presentation, Mr. Roe referred to buckshee leases. Certainly, in British Columbia, this is an issue.

This is a situation where a first nations entrepreneur, we'll say, decides to invite a developer or a number of people to come on to his property and build a mobile home park. Usually what happens is that it's a trailer park. They don't bother seeking the approval of the department for that, so they end up—they call it buckshee—basically not having any legal lease in place.

Oftentimes the individual passes away, which leads to all kinds of potential problems, given that the people who are living there—and usually these are people who are on a fixed income—don't have any legal tenure to be there. Often you're dealing with those sorts of issues, in terms of trying to figure out how to deal with the estate and whether that's actually an estate asset that you can transfer over. It's not a legal interest. It's not in the Indian lands registry system anywhere. You can't find it. It could be a one-page contract that the deceased signed off with a developer, who has now gone out and sold all of these lots. These people have fixed trailers there; they're not movable anymore.

That's an issue that I see quite a bit, in terms of how the lawyer manages those issues and tries to regularize that situation.

The advice I'm giving my clients in terms of the estate is that we need to regularize this. We need to get a formal lease agreement with the department or with the first nation. A lot of these first nations now have their own land codes in place.

**Mr. Earl Dreeshen:** Even from the position of the land codes and things of that nature, and the way in which first nations are managing their affairs, is there perhaps a way that they can have bylaws and so on that would give them some idea of how to administer wills and estates on the reserves?

I'm taking this from a little different position. Is there a structure available so that the first nations could say that this is how they are going to manage this, through some bylaw or whatever?

● (1645)

**Mr. John Gailus:** In theory, the two do intersect often, particularly for urban or suburban first nations where they do have development on the reserve. It's been a while since I've looked at the First Nations Land Management Act or the land codes, but there might be a possibility for them to put in certain regulations to say this is how they're going to address issues when estate matters arise.

I don't think you could go so far that they could develop their own code under the current regime.

**Mr. Earl Dreeshen:** There is another question I want to ask.

Mr. Roe, I believe you mentioned the concept of the $75,000 for the spouse and splitting it up with the rest of the beneficiaries after that, and how the changes were different in various provinces. Is that based on the value of the land or the assets? What are they looking at to make that determination? Obviously, even within a province, it's going to be different valuations that you would anticipate.

How did that come about, and is it related to land value, or is it a decision that's been made in those various jurisdictions?

**Mr. Brock A. F. Roe:** I'm sorry, I don't know how that number came about for Ontario, B.C., or Alberta—B.C., $300,000; Alberta, $150,000; or Ontario, $200,000. I wish I did know, and even then, under the Indian Act, how they came about with a $75,000 number.

When it plays out in the community when you're talking about that, if you're the spouse survivor and your partner passes away, I don't want to say they're thinking selfishly, but let's say they have an acrimonious relationship with their children. They want to argue that the estate falls below that threshold because they want to keep that $75,000 for themselves. If anything goes above that and if they have one child, they're going to have to share. The first $75,000 goes to the spouse and then whatever balance is shared between them, and then on and on.

When you start playing with that threshold level, you start adjusting the amount that the spouse is entitled to. I don't know how you can value a reserve interest that would be creeping up into the $150,000 to $200,000 to $300,000 range for first nations that are remote. For first nations that are located in an urban context, you can start to maybe see that threshold come into play.

That's where I see that.

**Mr. Earl Dreeshen:** With that threshold, if the first $75,000 goes to the spouse and you had, say, three kids, is the rest split among the four of them? Let's say it was a $500,000 estate. Of that, $200,000 would go to the spouse. Then you'd have another $300,000. Is that split evenly among three children and the spouse, or is that all the spouse gets? How does that work?

**Mr. Brock A. F. Roe:** There's the first cut, which is the $75,000 or whatever the threshold amount is. That goes to the spouse. Then afterwards, it's simply a formula in the Indian Act or the provincial regimes, whichever one you go on. They're all kind of different. My understanding is that it goes spouse, then spouse plus one child, but it's spouse before child.

**Mr. Earl Dreeshen:** Yes. That's the point I wanted to clarify.

**Mr. Brock A. F. Roe:** If there are no children, it goes to the parents. If there are no parents, then it goes to the brothers and sisters. That's typically how it goes.

**The Chair:** Mr. Clarke had a short follow-up question.

**Mr. Rob Clarke:** It's just a segue with regard to that.

Hypothetically speaking, if my private member's bill, Bill C-428, does pass through the Senate, it will give first nations the right to form their own bylaws. That's a very key component of my bill. It's about self-governance. I think that's one component where first nations can use it.

As a follow-up with regard to wills and estates, would that give first nations the right or the option to put in their own bylaws about wills and estates, to be administered by their own communities, without them violating the current structure or constitution?

Is that a solution?

**Mr. Brock A. F. Roe:** In my head, the trigger that goes off right away is that under the act as it is, the minister has to approve the will. I don't know if you're thinking of taking the discretion of the minister to do that out and then placing it in a bylaw power for chief and council to make a decision on. Then subsequently for administering the estate, it could be the same thing. The department wouldn't do it, but the chief and council or their administration would. Is that what you're getting at?

● (1650)

**Mr. Rob Clarke:** What I'm getting at is that I want to see the minister removed from the whole process outright and the power given back to the first nations. Would having that first nations community incorporate the wills and estates legislation into bylaws work as a possible solution?

**Mr. Brock A. F. Roe:** It's complex, I know. I understand where you're going with that. I as well want the first nations to be able to deal with this on their own.

When you have a small reserve with small membership.... You're from Muskeg, right? There are thousands of first nations out there. I'm from Bigstone. It's the same thing. There are thousands. The administration is big, but there are still large family groups involved. I get sort of concerned with procedural fairness when you have a system set up on reserve administered by the people on reserve for their thing. I want to make sure everybody has a fair process in dealing with their family's estate. You want to be able to make sure that integrity isn't tainted. If you have, on some kind of a regional level, something that everybody kind of is in agreement with, maybe that's something that can be considered.

Giving bylaw power specifically to each nation without talking with the nations, I feel, is making things a little bit too discrete in terms of decision-making.

**Ms. Valerie Richer:** Can I jump in?

I think you have to have a legislative source for that. You couldn't just establish a bylaw without knowing where that source of power came from, and it would come from sections 42 to 50 of the Indian Act. If you removed sections 42 to 50 and said we're just going to deal with these things through bylaws, then you'd also have a problem, because the province couldn't deal with them. There would be this legislative vacuum. You need to have a legislative source to ground that bylaw.

**The Chair:** I think there are many questions. Clearly you have provided us with a lot of questions as to why those questions exist, so we appreciate your testimony today.

Committee, we will suspend for a few minutes, but before we do that, we want to thank Ms. Richer, Mr. Roe, and Mr. Gailus for being here today.

We know that you're very busy and that you've given your time today. Thank you so much.

We'll now suspend.

[*Proceedings continue in camera*]