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Chair

The Honourable MaryAnn Mihychuk

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● (1530)

[*English*]

The Chair (Hon. MaryAnn Mihychuk (Kildonan—St. Paul, Lib.)): We are waiting for one more member, but we don't want to keep our presenters waiting.

We are here to discuss the United Nations declaration. It is Bill C-262, an act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.

Cathy?

Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC): Yes, just before we start, I'd like to move:

> That the Committee suspend its study of Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, until a consensus is reached on how free, prior and informed consent will be implemented.

The Chair: That motion is debatable. Is there any debate?

Arnold.

Mr. Arnold Viersen (Peace River—Westlock, CPC): Yes, I would support that motion, for sure.

Has the justice committee or the justice department even gotten back to us yet on the...?

The Chair: I believe we did receive information from Justice.

Mr. Arnold Viersen: I would say that, for sure, we've heard six or seven different outlines of what free, prior, and informed consent means. If nothing else, I think we should suspend and send this over to the justice committee perhaps. It's things like that....

The Chair: I remind members that we have panels, so I'm going to.... Hopefully we can....

Gary.

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): Madam Chair, we will never get consensus on this, but there is a general sense of where FPIC stands vis-à-vis Bill C-262.

In our study we had a plan, and we're more or less coming to the end of that plan. It's almost disingenuous to bring this up at this stage. I think we're comfortable going ahead, and I don't think we need to suspend at all.

The Chair: MP Saganash.

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, NDP): Thank you, Madam Chair. I won't take long, I promise.

I don't think there will be consensus between us and the Conservatives on that question. That's pretty clear. I've submitted documentation with respect to free, prior, and informed consent, but I think we need to note the study that was done by the Expert Mechanism on the Rights of Indigenous Peoples in the UN, which explains the four components of free, prior, informed, and consent. There's an international consensus not only on free, prior, and informed consent but also on this international human rights instrument called the UN Declaration on the Rights of Indigenous Peoples.

I don't think that's even debatable.

The Chair: Shall we call the vote on a suspension of the study?

(Motion negatived)

The Chair: We're going to move now to our presenters. As I was saying, we're hearing opinions from the public on UNDRIP and private member's Bill C-262.

Those of us in Ottawa are on the unceded territory of the Algonquin people.

We have with us on video conference John Borrows, who is calling in from Victoria. Welcome. We can see you on the screen.

When we get to the question period, I'd urge you to identify who the question is for.

Without holding up the hearings any more, I will call on the Specific Claims Tribunal Canada, whose people are here with us, and I have them as leading off with their presentation.

You have up to 10 minutes. I'll try to give you subtle hints about our time, and then they become less subtle as we get closer to the end. Welcome to our committee.

● (1535)

Mr. Justice Harry Slade (Chairperson, Specific Claims Tribunal Canada): I've had the experience.

Thank you, Madam Chairperson, and honourable members for this opportunity to speak on Bill C-262.

I am a justice of the B.C. Supreme Court, and since 2009, chairperson of the Specific Claims Tribunal Canada. The latter is an independent tribunal with a mandate to adjudicate certain categories of historical claims of what are described in the act as “first nations”. These arose primarily during the period from the early days of colonization up until as recently as 15 years ago.

The tribunal has no jurisdiction in relation to claims arising around indigenous rights; in other words, section 35 claims.

My comments are not proffered as opinions on any question of law, or a preference on any matter of political controversy. They're personal, and informed by my experience as a lawyer representing indigenous groups from the late 1970s until my appointment to the court in 2001 and as a long-time observer of events in the context of indigenous crown relations. Here there a lesson from my work to establish the processes of the tribunal and adjudicate claims before it.

I should mention also that I am somewhat informed by my spouse Dee, a Tsimshian from the north coast of British Columbia, whom I must obey.

Some hon. members: Oh, oh!

Mr. Justice Harry Slade: My presentation is an attempt to describe in neutral language, and based only on conclusive findings of the Supreme Court of Canada, the prevailing legal context in which we see the bill introduced.

I'd like to identify questions about the intended effect of the bill with respect to the indigenous rights set out in the declaration, and to make an observation or two about the direction provided by the Supreme Court with respect to contemporary treaty-making and any correspondence it may have with article 27 of the declaration. It calls on states to “establish and implement...a fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources”.

By the way, I do have a paper. I don't think it's been circulated yet, but you can read it if you're inclined at your leisure.

Article 26 states:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership....

Of course, there is also article 32, which provides that states shall consult with indigenous peoples “in order to obtain their free and informed consent prior to the approval of any project affecting the lands or territories”.

There is quite a bit of public chatter about what all of that means. We see people in the media who assert that FPIC is an absolute. Others suggest that it would not displace the common law, which provides for consent where aboriginal title is established subject to the crown being able to establish justification for infringement.

What has the Supreme Court said? In Tsilhqot'in, where aboriginal title to land has been established by court declaration or agreement—and I emphasize those two things—the crown must seek consent. Absent consent, development of title land cannot proceed unless the crown has discharged its duty to consult and can justify the intrusion.

● (1540)

Where aboriginal title has not been established, the crown owes duties of consultation and accommodation. We often see this in the courts in applications for judicial review, where the indigenous nation claimant must establish a prima facie case for title, and the degree of consultation and accommodation will depend on the apparent strength of that claim. Throughout, according to Tsilhqot'in, the onus for proof of title was found to be on the applicant or on the asserting nation claimant.

The government website sets out its principles respecting the Government of Canada's relationship with aboriginal peoples, as of February 14, 2018, a week after which the bill cleared second reading and was referred to committee. I'm not going to go through those 10 principles, but they are in my paper.

I think it's evident from the principles—the explanatory text with the principles and the speech by the minister, the Honourable Jody Wilson-Raybould, which I referred to in the paper—that the government seeks to identify the indigenous nations for purposes of advancing the nation-to-nation relationship with Canada; identify the territories of the indigenous nations; and to recognize the indigenous nations and territories by, at the least, requiring federal regulatory agencies responsible for project approvals to seek consent where the project under review may infringe, including consent respecting land for which title has not been established by court declaration or treaty. This is a departure from the common laws found by the Supreme Court of Canada.

As article 26 of the declaration asserts that indigenous peoples have the right to the lands, territories, and resources—what they've traditionally owned—certain steps have to be taken, in my view, to give effect to the provisions of the bill. That would include government at some point identifying the indigenous peoples as distinct polities that may be considered indigenous nations, and at some point identifying the lands traditionally used.

This brings me to questions that parliamentarians may wish to consider in their deliberations, and if I could prevail upon Madam Chairperson to give me an extra couple of minutes, I'll get through these quickly.

The Chair: It's very tough, so it's got to be very quick. You have a minute.

Mr. Justice Harry Slade: First, does the bill obligate the government to introduce legislation purporting to fully establish in law the title of indigenous nations to historically occupied lands?

Second, does it matter in the implementation of the promise of the bill whether or not a recognized indigenous group can meet the evidentiary burden, as found in Tsilhqot'in, for proof of title?

Third, does implementation of the declaration, as contemplated by the bill, establish a third means, in addition to or as alternative to the requirement of common law for a court declaration or treaty, by which aboriginal title may be exercised as present ownership and possession of land?

If so, would unilateral action resulting in recognition of the ownership of land identified by government, as owned in both fact and law by identified indigenous nations, alter the balance needed to reconcile the interests that sustain the reality, as stated in Tsilhqot'in, that aboriginal and non-aboriginal people are all here to stay?

I'll close with an observation that the declaration, and apparently the bill and the decisions of the courts, have all addressed the means by which we get to reconciliation, and the court has described it as treaty-making.

This raises the question for me whether Canada has a viable and transparent process through which all proper participants may pursue negotiation of treaties that reflect the reality that we are all here to stay. It doesn't.

● (1545)

The Chair: I think there were some other comments that we're all here to stay. We're going to continue to hear from others on the panel.

We now go to Mary Ellen Turpel-Lafond.

Welcome. You have up to 10 minutes, please.

Ms. Mary Ellen Turpel-Lafond (Director of Indian Residential School Centre for History and Dialogue, Professor, Allard Law School, University of British Columbia, As an Individual): Thank you, and good afternoon, everyone.

I just want to identify the position that I now hold to give you some context for my remarks. I am a professor of law at Allard Hall Law School at the University of British Columbia, and I am the director of the Indian Residential School Centre for History and Dialogue. In my background, I had 20 years as a judge in Saskatchewan, and 10 years as a child advocate in British Columbia, and I was a law professor before that.

I come to the committee today first of all acknowledging that we are on Algonquin territory.

It's a great honour to be here.

Out of respect to the committee, I have had a chance to follow your proceedings and to read them. I had a chance to attend and listen as well, so I'm not going to cover ground that's already been covered. You've held extensive hearings and have received a great deal of evidence, so I'm not going to go into a lot of arcane legal issues, although I want to be available to answer any questions you might have, either in session or, more generally, to be helpful.

My perspective is really as an indigenous person but also as a constitutional scholar, as a judge, and as an individual who works very closely with addressing the legacy of residential schools and supporting reconciliation to be effective. It's also from a very pragmatic viewpoint, since I have dealt with, just in the child welfare area, 17,000 cases and have worked extensively with indigenous children and families and trying to address some of the more structural issues.

From that perspective, I want to make one general comment and a few small comments, but I'm probably going to use less time.

My general comment is that the fundamental transformation that UNDRIP brought 10 years ago was 10 years ago, but it was very significant and has become very settled. It's widely accepted. It's used extensively by indigenous people and non-indigenous people, and it's extremely helpful. I see UNDRIP, at the most fundamental level, as recognizing indigenous rights as human rights. I believe that Bill C-262 will assist us to come closer to the point of being able to have genuine reconciliation. It's extremely positive. I don't see it as any way disruptive or threatening, knowing what I do about constitutional law, history, and how courts deal with matters. Our Constitution is based on peace, order, and good government. There are specific provisions in UNDRIP itself. All human rights have limits. It is not a radical, disruptive measure to adopt UNDRIP. It's, in fact, an incredibly helpful tool.

I will just say that in my practical work with children and families, as many of you will know, there have been some very significant rulings of the Canadian Human Rights Tribunal dealing with indigenous children and disparities in funding. These matters are being actively worked on. The Canadian Human Rights Tribunal, when it issued its fourth compliance order this year, specifically looked to the language of UNDRIP as being helpful in dealing with issues for children and families.

I bring that to you because I appreciate that not everyone works closely with these intergenerational issues of residential school survivors, and they don't always appreciate that it didn't end when the residential schools ended. The grossly disproportional number of indigenous children in care, the need for indigenous families to be heard and understood, and the need to have reconciliation in our provinces and our territories will be very positively impacted by federal adoption and support for UNDRIP at the highest level in legislation.

In its most recent compliance order—which I'm not going to read—the Canadian Human Rights Commission has two paragraphs, paragraphs 75 and 76, that adopt UNDRIP as an interpretive value to understanding what's going on with indigenous children and families. In particular, it talks about the fact that children have the right to be free from discrimination—highlighting articles 2, 7, and 22 of UNDRIP and, more importantly, article 8 and how we have to understand that forced assimilation doesn't work. Indeed, the doctrines of superiority that were part of the residential school process—and part, frankly, of the child welfare process, where indigenous families are judged and assessed as being inferior, and their children are easily removed—made it very challenging in Canada to be able to push back and have a more respectful space for those families. I say this as a person who has dealt with 17,000 child welfare cases as a child advocate.

What UNDRIP does is that it provide an interpretive lens that helps us to have a conversation and to understand what's happening, such as the forceful removal of children and the systemic issues. It is not a disruptive, unhelpful thing. It's extremely helpful, and it will be received in a legal context that is methodical, plodding, and clearly about limits and reasonableness.

● (1550)

I really am happy to answer any questions. I have noted in reviewing the proceedings to date and following the questions that there seems to be some difficulty, wherein people accept UNDRIP but have difficulty accepting that it should be in legislation. I certainly am of the view that there's no difference between accepting UNDRIP and the context of what the bill says within itself as legislation. It really is a seamless process; it presents no terrible threat.

I have also followed your discussions on FPIC. In the same context, I would say to you that I heard former attorney general Geoff Plant—a very experienced individual—say the other day that it's part of civil society to work together. It's part of civil society to engage.

Unfortunately, we haven't had the best terms of engagement. I note, however, from the Saskatchewan viewpoint, taking treaty land entitlement as an example, that when people do engage and work together, it's not just a matter of consent, but there are huge successes that occur. I've seen this happen, and it doesn't matter whether it's a Conservative, a Liberal, or an NDP government, or what have you.

I urge you to take a generous and appropriate approach to this bill, because it's a tool that will be immensely helpful even in provincial and territorial systems. It is not a threatening or menacing matter. I do not feel that we have to have the Oxford University approach whereby we define every problem and issue.

There are 600-plus first nations in Canada. They have the capacity to engage in self-determination and move forward. It will be a slow, methodical process, but it's one that will be aided by a positive respect for human rights, and it is part of responding to the legacy of residential schools.

I'm happy to answer questions. I want to end before my time to prove a point, and I don't want to repeat anything you've already heard.

I have high regard and respect for the work of this committee, but I want to tell you that there are many people on the ground—children and families—who rely on UNDRIP and its fundamental concepts to give meaning, inspiration, and affirmation that their human rights are taken very seriously in Canada.

The Chair: Thank you so much.

Now we're going to hear from John Borrows from Victoria. He's on the teleprompter.

Please go ahead.

[*Translation*]

Mr. John Borrows (Canada Research Chair in Indigenous Law, University of Victoria, As an Individual): Good afternoon, everyone.

● (1555)

[*English*]

I'm thankful for the opportunity to be here today. I want to speak in the language of this territory, just to introduce myself.

[*Witness speaks in Anishinaabemowin*]

I just introduced myself as being from the Cape Croker Indian Reserve on the shores of Georgian Bay, in Ontario. I'm of the Otter Clan, and my name is Kegedonce.

I'm the Canada Research Chair of Indigenous Law at the University of Victoria Law School, and I've been teaching for 25 years. We've recently received approval from the British Columbia government to go ahead and fund a joint degree in indigenous law and the common law, and so we will be teaching these legal systems together just as at McGill they teach common law and civil law together.

In talking about this bill today, I want to stress two points. It's principles-driven and process-oriented, and I think the principles are worth rehearsing and the process is worth emphasizing.

The principles are that this is about democracy and participation and about people working together in this framework of human rights. The principles are very much constitutionally sound and driven and consistent with the constitution, including the role of indigenous peoples in participating in their own communities and with other governments in defining opportunities and challenges that they're facing.

These principles are also well chronicled in the Truth and Reconciliation Commission, to which this bill makes reference in the preamble. These principles are directed to addressing the injustices that are historic and current across our country. As you know, 64% of the children in care in British Columbia are indigenous. Twenty-eight per cent of the prison population of Canada is indigenous, as examples of the contemporary injustices that are part of our system.

I do want to make the point, though, that part of the principles of this bill are limitations on governments, indigenous and Canadian. For instance, there has been a recent controversy in Quebec and the Kahnawà:ke reserve about the marry-out get-out laws.

Those laws, under this bill, if they were to be articulated, would have to account for article 9 of UNDRIP, which says that indigenous peoples have the right to belong, in accordance with the traditions and customs of their people, but that no discrimination of any kind may arise from the operation of this act.

The point I'm making here is that UNDRIP will not apply just to Canadian governments. UNDRIP will also apply to indigenous peoples themselves. So whenever indigenous peoples operate within this document, they themselves will be receiving and obligated to follow the same kind of human rights concerns that are part of the United Nations, part of Canadian law, and indeed, part of their own legal traditions, because it is the case that there are many different points of view within indigenous law, and there are ways of working through those conflicts that are respectful of human rights.

I want to make the point that this is repeated over and over again in the document. So yes, we will be expecting, if this bill becomes law, that indigenous peoples will be protected from state incursions in relation to life, liberty, security, labour, housing, health, education, media, religion, spiritual practices, land, community membership, etc. But I also want to emphasize the point that indigenous peoples will also have to pick up this document and use the same human rights concerns within their legal traditions to respect life, liberty, security, labour, housing, health, education, media, religion, spirituality, land, etc. This is a very important contribution to the rule of law in this country. Anishinabe law, Blackfoot law, Salish law, Mi'kmaq law, and Honeshonee law all have human rights traditions, and these traditions will be enabled to flourish as a result of the implementation of this bill.

Now let me make the other point about article 46 of the declaration, which says that nothing in this bill can be construed to dismember the territorial integrity or the political sovereignty of the nation state of Canada.

There are definite limits on indigenous peoples as this right is being exercised. Likewise, article 46.2 says:

> The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law...in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect [of] the rights and freedoms of others and for meeting the just and...compelling requirements of a democratic society.

The point to make here is that no rights are absolute in our country and this document does not change that point. It's also to make the point, though, that the crown's opportunities are also constrained. When subsection 35(1) was passed, it represented a constraint on the sovereignty of the crown. Just as the charter is a constraint on the sovereignty of the crown when it comes to individuals, so are aboriginal and treaty rights a constraint on the sovereignty of the crown when it comes to indigenous peoples.

The point I'm making here is that it's not just for this committee alone, or this chamber alone, to be able to determine what the rights and obligations are under our charter or our aboriginal rights or this declaration. The framework is that we are all limited and we—here's the principle—through consultation and co-operation will create a national action plan that is a process-oriented, continuing conversation about how we harmonize these opportunities together. We would then report to Parliament frequently to determine how our progress is happening along that front.

The framework for subsection 35(1) is that aboriginal rights are *sui generis*, meaning they're unique or of their own kind. The Supreme Court of Canada says that a morally and politically defensible conception of aboriginal rights will incorporate both common law perspectives and indigenous perspectives. This bill is very consistent with that constitutional heritage and tradition. It picks up on the limitations that indigenous peoples will have to act within in accordance with the Constitution, in accordance with this bill, which are human rights limitations, as well as giving way from time to time to the right of other Canadians when it's demonstrably justified in a free and democratic society.

Likewise, the crown is also limited. The whole justification test in subsection 35(1) says to the crown that you cannot do just what you want. This goes back to the Glorious Revolution and the Magna Carta, the expectation that our governments are limited and that there are checks and balances on our governments. This document is about those kinds of checks and balances. I think that the process-oriented provisions found in this bill, which are driven by principle, will enable us to work through these democratic debates in a human rights context, in a fashion that allows us to carefully, and with reasonableness through time, ensure that we get the proper balance and the harmonization.

When I think about harmonization, I think about playing a piano. If you put your fingers down on a piano keyboard, you're often pressing different keys. That's what we'll be doing when we try to determine the rights of Parliament, other Canadians, and aboriginal peoples. But it's possible, with harmonization, when you press those keys to get a sound that is resonant. I believe this bill is a part of that resonance that flows from our history, our constitutional traditions, and is directed by what we were called on to do by the Truth and Reconciliation Commission.

[*Witness speaks in Anishinaabemowin*]

Thank you.

● (1600)

The Chair: Thank you.

Questioning now moves to MP Will Amos.

Mr. William Amos (Pontiac, Lib.): Thank you to all of our witnesses today.

It is a treat to have you here. I will disclose to Professor Borrows that I've been a huge fan of his for many years, and this is a great moment to be able to ask you some questions about this bill. I'd like to extend my line of questioning and jump between Bill C-262 and Bill C-69, because there's a very live debate around the incorporation of UNDRIP in that context, and I'm sitting on that standing committee as we consider that bill.

My first question is directed to Professor Turpel-Lafond and Professor Borrows. Bill C-69 has been subject to some criticism for not sufficiently incorporating both UNDRIP and its principles. I will be bringing forward amendments to do just that in the days to come.

I don't presume that you have expertise or knowledge of Bill C-69, but I'm hoping that you do have some understanding. If you take it for granted that we're looking at an impact assessment regime, how should Bill C-262, if enacted, be properly reflected in a bill such as Bill C-69?

I put that to you both, please.

● (1605)

Ms. Mary Ellen Turpel-Lafond: Bill C-262 is a very significant centrepiece and serves as a national project of resetting appropriately the relationship, and reconciliation. Individual pieces of legislation, like the impact assessment legislation, should also have a reference to UNDRIP. It's not a single statutory instrument; it should be referenced there.

I'm also engaged with the chiefs of Canada in looking at legislation on child welfare. Minister Philpott, who spoke to our special chiefs assembly recently, has said that we need to recognize UNDRIP in a future piece of legislation on child welfare.

The acknowledgement and recognition of UNDRIP is a very significant piece of that imprint because it helps us to understand what the deeper issues are. Again, as Professor Borrows has said, it is not disruptive. It's additive to a tradition of trying to appreciate how we got to the places we got to. As a constitutional scholar, I would say that the debate you have heard in this committee about FPIC has been somewhat misrepresented. FPIC is not an absolute right; it is actually understood in a context. When we look at environmental or impact assessment, we are looking at engagement, we are looking at working together, and we are looking at reasonableness and fairness, all of which are aided by UNDRIP.

My respectful view is that Bill C-262 is extremely significant for Canada, but so, too, is a reference to UNDRIP in other statutory instruments, particularly ones that impact aboriginal people directly and for which the crown and members of the House recognize a need for clarity. Just as the Charter of Rights will be recognized, and has been recognized in different ways in policies and law, UNDRIP is a very significant component of setting an understanding.

Mr. John Borrows: I agree, and I would add that when legislation is passed by the House, it has an enforcement component to it. I think that we rightly spend a lot of our time thinking through the implications in relation to enforcement, but this legislation also has an educative function. To the extent UNDRIP is mentioned not only in Bill C-262 but also in legislation dealing with environmental assessment, it will help to perform that task of educating the public —those who are involved in and have to live in accordance with the assessment regime—that indeed UNDRIP is live and is a part of that process as well.

Mr. William Amos: Okay.

I'd like to give the opportunity to Mr. Slade, as well, to address that issue.

Mr. Justice Harry Slade: Well, I agree with everything that Professors Turpel-Lafond and Borrows have said about positioning UNDRIP in relation to enactments that have some bearing on indigenous interests, including the provisions that go to the social conditions. It clearly is a positive statement, albeit some might say it's unnecessary because Canadian law is such that people should not suffer discrimination based on race. Whether or not that's so, there's plainly a need to address as somewhat unique the particular circumstances of indigenous peoples, having regard for these statistics that you mentioned earlier.

With respect to land, however, it comes down to expectations, it seems to me. I think one would have to have been fast asleep for the last while not to realize that expectations are being formed around ownership of traditional territories and FPIC, which, in my respectful view, require careful attention and clarification. This is not to be negative about it, but it is to signal that expectations need to be addressed as we see them arise.

● (1610)

The Chair: Questioning now moves to MP Cathy McLeod.

Mrs. Cathy McLeod: Thank you to everyone here, especially from my home province of British Columbia.

I hate to be like a dog with a bone on the FPIC issue, but I have to pick up from what we were just saying. If anyone was listening to the AFN in the last few days, there seemed to be a lot of different perspectives about what FPIC and Bill C-262 were going to accomplish.

Some of the witnesses here today have a very clear understanding of what they believe FPIC is, but even my NDP colleagues on TV last week and then in the House today, gave a much broader meaning to FPIC. This is part of the reason I truly believe it's important that the definition be such that, as some of you have indicated, there is a common understanding, or else we will be creating a lot of significant problems down the road.

Justice Slade, would you care to comment on that? We've had three definitions from one witness. We've had everything that's been said in the last few days, and so I think we have an issue with the definition.

Mr. Justice Harry Slade: I think the emphasis in the declaration is on seeking consent, not requiring consent. Who could contend that this is not a good idea?

Mrs. Cathy McLeod: I don't think anyone would say it's not a good idea.

Mr. Justice Harry Slade: I'll never be called upon to adjudicate the matter, so it's probably fairly safe for me to say that it's pretty clear to me, from looking at UNDRIP and the movement toward implementation, whether that be legislative or simply by policy, that Canadian common law is not likely to be disrupted by it.

Mrs. Cathy McLeod: A legal expert described the bill as quasi-constitutional. Would people agree that this is not a typical piece of legislation, in that it's quasi-constitutional?

I'd like a quick yes or no from all three of you.

Mr. John Borrows: I think what happens here is it implements our Constitution, and so in that respect it's connected. Of course, the bill could be changed by a subsequent Parliament, and so it's not constitutional in that regard. Another party might entertain other ways to implement UNDRIP.

In relation to the former question, I think you're right, in that there are going to be differences of opinion around what FPIC means. That is why the process and the principles that guide this legislation are important.

Just as we have a difficult time saying what is equality or life, liberty, security, association, freedom of the press, if we were to wait to define equality, for example, before trying to implement it in legislation, there are so many different views of equality, I don't think we'd ever get there. Likewise with life, liberty, or security.

What this does is that it commits us to a process where the differences of opinion can be joined, and then through the political process we can saw off and work to compromise the harmonization —

Mrs. Cathy McLeod: Thank you.

Sorry, I have a few more questions, and I only get seven minutes.

I believe we could come up with a definition that would fit with this, but if this truly is a quasi-constitutional piece of legislation, to have it go through a private member's process without having the opportunity for the due diligence of even getting the minister here to talk about this bill.... A government bill is very different from a private member's bill; we're talking about a very significant piece of legislation. It sounds as if everyone believes it to be.

Justice Slade, do you have any comments on that?

● (1615)

Mr. Justice Harry Slade: Frankly I don't see any difference. It depends on who supports it, and I gather that at second reading the government supported it. I would offer an observation that it's a bit unusual to enact legislation calling for other legislation to be enacted. Frankly, unless it's constitutional, I don't see how that can be enforced, but it delivers a message that the author and the proponent of the bill, and presumably the government, want to get out there, and what's wrong with that?

Mrs. Cathy McLeod: Article 19, which is more about the laws of general application, seeks to acquire.... To meet that sort of standard in terms of the Inuit, the Métis, the as yet undefined Daniels v. Canada, and the first nations from across the country that have not reconstituted...?

My other concern is that we have created something so unwieldy that the government could not even afford something such as Bill C-45, because everyone would have the right to have their consent sought on these issues.

Mr. Justice Harry Slade: I guess you have to start somewhere.

Ms. Mary Ellen Turpel-Lafond: I'm happy to comment on some of the assumptions I'm hearing.

One is that UNDRIP, in terms of article 19, seeks to promote a relationship that is collaborative. However, I want to emphasize—again, from reviewing some of the evidence, and obviously you have heard a lot—that constitutionally, the law is the law. People can say, “This means I have that,” but that's not accurate.

FPIC, as an example, is not an absolute concept. It has been presented sometimes as such by all kinds of people, but that's actually wrong. It's constrained. It's within a context of reasonableness, and it's framed.

It's the same with UNDRIP. What kind of a statute is this? Well, it's a federal statute. Where it starts and where it ends, I don't know. Certainly, it would be very important for all parties who have supported UNDRIP to find a way to bring this to a higher level and not to argue.

In any event, the technical questions you have asked do not seem terribly insurmountable to me. Legislation is legislation.

The Chair: Questioning now moves to MP Romeo Saganash.

Mr. Romeo Saganash: Thank you, Madam chair, and welcome to our guests in Ottawa.

[*Translation*]

Welcome, Professor Borrows. I know that you are taking French classes at the moment, and I hope that they work out well for you.

[*English*]

I want to start with both professors. Some expert witnesses came to this committee and talked about the rights contained in UNDRIP as human rights, and that's how they have been treated for the last 35 years in the international arena.

Paul Joffe, one of our legal experts, talked about the charter rights that are contained in part I of our Constitution, and the section 35 rights that are contained in part II of our Constitution. The Supreme Court has referred to them as sister provisions.

We know that in our legal system, under section 4.1 of the Department of Justice Act, the Minister of Justice has to make sure that legislation is consistent with the Charter of Rights and Freedoms. We don't necessarily have that obligation with indigenous rights, aboriginal rights, or treaty rights in our system.

I believe that the minister would have that obligation even without Bill C-262, but do you believe that Bill C-262 would achieve that? Whenever legislation is contemplated in the future, will the government have to make sure that its laws are consistent with the UN Declaration on the Rights of Indigenous Peoples?

Maybe I'll start with Mary Ellen.

● (1620)

Ms. Mary Ellen Turpel-Lafond: I do think that that's a very significant objective and an imperative that has already been accepted by the federal government, from what I understood from the statement of the Prime Minister on February 14 in the House of Commons.

More generally, as a principle of international law as adopted by Canada, these are human rights, and this does relate to section 35. There have been deficiencies in addressing section 35 appropriately. I'm not saying that there haven't been some good individual decisions, but there have been very structurally significant problems with moving forward on section 35 in a respectful, positive way with an appropriate human rights lens.

Bill C-262 allows us to put that human right lens appropriately where it should have been all along, but the depth of our dialogue was constrained by many historical factors. At the same time, the depth of our dialogue is enhanced by the acknowledgement that we've had longstanding respect for the rights of indigenous people, but many of our laws, policies, and practices are premised on the colonial assumption that indigenous people were not on the land, that they did not govern, and that they didn't have family structures. That more oppressive colonial context, which we know is false, is where human rights help us to rethink it. It's not going to unwind everything, but will help us to reconsider.

Just as human rights evolve as a living tree, this is a living tree. I do emphasize that it's part of a tradition of a reasonable—I'm not saying incremental—thoughtful, constrained approach, but it should also become a part of a routine human rights concept. All human rights have limits, but they provide a very valuable way to understand how we relate to each other and how government relates to citizens.

Mr. Romeo Saganash: Professor Borrows.

Mr. John Borrows: I would agree and say that the orientation is also welcome. Sometimes there's an assumption that indigenous peoples are diametrically opposed, adversarial, or at odds with the way that we want to see ourselves develop as peoples living in this country. The notion of consistency communicates that very important and powerful ethos that we can strive to live together in ways that are complementary and congruent with one another, other, as opposed to being inconsistent and out of step with one another. The fact that the government would undertake that kind of review is an important aspect of that, but it sends the more general message that we don't have to be in this place of always seeing the world in diametrically opposed terms.

Mr. Romeo Saganash: I want to refer to subclause 2(2) in Bill C-262 as well as clause 3. Subclause 2(2) says that Bill C-262 cannot be interpreted as delaying the application of UNDRIP in Canadian law, and clause 3 talks about UNDRIP being an international human rights instrument having application in Canadian law. I would like to know if our guests here agree with those two.

Maybe we should start with Justice Slade.

The Chair: We have a minute and a half.

Mr. Justice Harry Slade: Others may have more to say, but I agree with them.

Mr. Romeo Saganash: Mary Ellen.

Ms. Mary Ellen Turpel-Lafond: Yes, I think it's very helpful, because we've had the quagmire that sometimes comes up around fundamental denial of rights, so I think it's extremely valuable to have that, because it's affirmative. Is it superfluous? No. It's affirmative, and it's important to be affirmative.

Mr. John Borrows: I have nothing further to add.

Mr. Romeo Saganash: Thank you.

The Chair: Questioning now moves to MP Mike Bossio.

Mr. Mike Bossio (Hastings—Lennox and Addington, Lib.): I'm going to pass my time over, Chair, to Dan Vandal.

Mr. Dan Vandal (Saint Boniface—Saint Vital, Lib.): Thank you, Mike.

Thank you to everybody for your very good presentations.

I guess the question I want to ask everyone is this. Let's assume that Bill C-262 will get approved, but before that, do you have any suggestions for how we can improve this private member's bill? Do you have any suggestions for amendments as we go down this road?

Let me begin with Mary Ellen.

● (1625)

Ms. Mary Ellen Turpel-Lafond: Yes, there's one area that I think could benefit from clarification. In a way it's because of what I've heard in some of the misunderstandings of FPIC and these extreme views. I think we need to be moderate and respectful of our constitutional history. In particular, in the preamble, we could have a new paragraph that would say something like: whereas implementation of UNDRIP constitutes a principled framework for justice, reconciliation, healing and peace.

I think it should be focused on the fact that it is about bringing people together, not pulling people asunder. As someone's who's worked extensively with indigenous people throughout my career, I've repeatedly faced very adversarial events, cases, negotiations, whatever. But in the end, the most durable and successful initiatives are ones that are based on this commitment to reconciliation, healing, and peace. We have some historical precedents such as—I mentioned this—treaty land entitlement in Saskatchewan, where people work together, and whether you want to call it consent, it's peacemaking, and it's been remarkably positive.

I would respectfully suggest to you there could be an improvement in the sense of clarifying that this is about creating a more harmonious and peaceful.... It's not a disruptive, radicalized initiative. It's actually about human rights, peace, and harmony, and that, I think, could help address some of the perhaps more extreme interpretations you heard, which I don't think are valid. It's to say, just to be clear, that we are about reconciliation, healing and peace. I think it would be very valuable to emphasize that.

Mr. Dan Vandal: Thank you.

Harry Slade.

Mr. Justice Harry Slade: I think I've already spoken to how clarification would be very desirable. As it stands, it's open to some to understand FPIC, in particular, in one way, and others to understand it in others.

The last thing we need is conflict over understandings of what UNDRIP stands for and what the article that provides for FPIC stands for. I would join Professor Turpel in encouraging an amendment to the preamble along those lines.

Mr. Dan Vandal: Thank you.

Mr. Borrows.

Mr. John Borrows: I would be happy to see that occur. I do note that we have the language of harmonization and consistency. The Treaty of Niagara, a treaty that was a part of the formation of Canada in the central part of the country, talked about peace and friendship and respect. I think there's a long constitutional tradition of striving to live together in that fashion. Certainly what Mary Ellen suggested would be consistent with that broader hope that we have when we put together our treaty relationships.

Mr. Dan Vandal: Thank you.

The Chair: That's it. Those actually are the concluding comments we will be hearing from all of the witnesses, and I think the consensus among our presenters was that this is going to move Canada forward in a positive way. There's clearly some uncertainty. We hear that from large industrial operators, particularly in the mining sector and with some of the issues with FPIC, but overall, we hear about Canada's law and order, good government, and that's it's a positive step.

I want to thank you for coming, and now I see that we have a little bit of committee business to deal with. I'm going to recognize MP Kevin Waugh.

Mr. Kevin Waugh (Saskatoon—Grasswood, CPC): Thank you, Madam Chair.

With respect to Bill C-262 regarding the United Nations Declaration on the Rights of Indigenous Peoples Act, I have a motion that reads:

> a) the Chair of the Committee write, as promptly as possible, to the Chairs of the following standing committees inviting them to consider the subject-matter of the said Bill:
>
> (i) the Standing Committee on Natural Resources;
>
> (ii) the Standing Committee on Justice and Human Rights;
>
> (iii) the Standing Committee on Environment and Sustainable Development;
>
> (b) each of the standing committees, listed in paragraph (a), be requested to convey recommendations, including any suggested amendments, in both official languages, in a letter to the Chair of the Standing Committee on Indigenous and Northern Affairs no later than May 31, 2018;
>
> (c) any amendments suggested pursuant to paragraphs (b) shall be deemed to be proposed during the clause-by-clause consideration of Bill C-262, and further provided that the members of the Standing Committee on Indigenous and Northern Affairs may propose amendments notwithstanding the recommendations received pursuant to paragraphs (b);
>
> (d) amendments to Bill C-262, other than the amendments deemed to be proposed pursuant to paragraphs (b), be submitted to the Clerk of the Committee before May 31, 2018 and distributed to members in both official languages; and
>
> (e) the Committee shall proceed to the clause-by-clause consideration of Bill C-262 on Tuesday June 5, 2018.

I have this in both official languages.

● (1630)

The Chair: Thank you.

Is there any discussion?

An hon. member: No.

Mr. Kevin Waugh: Thanks, Dan—

The Chair: There is no discussion.

(Motion negatived)

The Chair: The meeting is adjourned.