House of Commons
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 027 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Thursday, April 7, 2005

Chair

Ms. Nancy Karetak-Lindell

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● (1110)

[*English*]

The Chair (Ms. Nancy Karetak-Lindell (Nunavut, Lib.)): Good morning, everyone. I'd like to get our meeting under way, so we can give as much time as we can to the witnesses before us today.

This is meeting number 27, Thursday, April 7, 2005. Pursuant to Standing Order 108(2), we are studying on-reserve matrimonial real property.

In our first hours this morning, we have as an individual witness, Ms. Danalyn MacKinnon, barrister and solicitor from the Beamish, MacKinnon Law Office. I welcome you to our committee meeting this morning and ask that you get on with your presentation, and then we'll do a round of questioning as time permits. I know we're a little over 11 o'clock right now, so I'll give you as much time as possible.

Ms. Danalyn MacKinnon (Barrister, Solicitor, Beamish MacKinnon Law Office, As an Individual): Thank you, Madam Chair. I appreciate being asked to appear before the committee today.

I understand that you have some background on the issue of matrimonial real property on reserves, and for further background information I refer you to this discussion paper prepared by Wendy Cornet and Allison Lendor of Cornet Consulting and Mediation.

So I won't go into the jurisdictional issue, other than to say that this is an area of law where there is a conflict between provincial jurisdiction, which does not apply on reserve in regard to property, and that of the federal government under subsection 91(26), which is on divorce, and subsection 91(24), which is on Indians and lands reserved for Indians, in dealing with the issue of matrimonial real property.

Why is this issue important? I can indicate that I am a practitioner or barrister/solicitor in a remote area of the country. I deal with first nations people in Treaty 3 and Treaty 9, and I also have a family practice, so this is an area where the two areas of my practice overlap.

In a general context in regard to family law, if there is no legitimate process or method for dealing with issues, then people begin to deal with them in an inappropriate way, that is, through criminal activities or violence. So it's very important in family law that there be a process that everyone can recognize in order to assist them in resolving matters.

For the general public, the home is generally the largest asset they are going to deal with. Historically, women have suffered more poverty as a result of the breakdown of marriages or separation. Often, family assets are necessary for meeting the needs of children. So there is also a relationship between who has the house and who gets custody of the children, because judges often don't want to move children from their home at the time of the separation of the parents. There has to be, and there has developed, a presumption that there has been an equal contribution to relationships, particularly long-term relationships.

So in a general context, these are the issues the provinces have developed some legislation to deal with in resolving property issues, because they affect other issues of matrimonial or common-law separations.

In the first nations context, I work mainly in fly-in or isolated communities, where there is a lack of housing. Most of the houses have been designated to male members by the band. Women have an extreme lack of education; their educational level is very low and they usually don't speak English. The average income on the reserves is very low and unemployment is very high.

One of the concerns of judges dealing with issues relating to families on reserve is that children would have to move off reserve if there were no housing available. So judges are very reluctant to move children from their home, because it means adjusting to a different culture, a different language, while living in an urban area. So it's a total adjustment that they would have to make. As a result, many first nations women who are separating end up leaving the community with their children. Statistically, according to Stats Canada, when they live in urban areas, there is a higher rate of single families than on reserve.

There are a couple of things that need to be done in order to resolve these issues.

One of them is that there needs to be a recognition that there is a difference between possession of the matrimonial home, or at least the home of the parties, and ownership. For possession of the matrimonial home, for example, in Ontario legislation, which deals with Ontario separating parties, you can have a court order of possession of an apartment because that is where the parties last lived in a matrimonial relationship. It doesn't matter who owns the apartment, so it is not an issue of ownership; it is an issue of possession of that home.

In emergency situations, often we need to have an order about the possession of that home immediately, because particularly if there has been violence in the relationship, one party has to leave, and if we can apply to a court for an order, we have the offending party leave the home by court order.

So the issue of possession of the home is different from the issue of ownership. Along with the possession of the home there are usually orders made about associated payments, who is going to pay the hydro, the utilities, that kind of thing, and those have to be enforceable.

The second issue has to deal with the home as a divisible asset. Is it an asset at the end of the relationship that actually has a value? This is where it is very difficult to apply provincial ideas of value to homes on reserve because in a provincial context it is always done on fair market value. On most reserves, the land is held communally, so that you don't own the land on which the house sits.

In an ordinary context, off reserve, one party would pay to the other a sum that represents the value of the interest that this person has in the home, so they would buy out the other spouse, or the house would be sold at a market and the parties would divide the proceeds. But who is going to buy a home on an isolated fly-in community where you have no right to live unless you are a band member, and there is no market value to the home.

I would suggest that except in some circumstances, homes on reserve don't really have a market value, and there have been court cases that have established that the home and the land cannot be separated, that is, you can't say that the home itself could be sold; it is attached to the land.

There are also, in the provincial context, common-law principles that do apply to non-matrimonial situations, for example, long-term, common-law relationships. There is a principle called constructive trust. That is, it doesn't matter whose name the house is in—this is in a provincial context—but it is being held for both parties and one of them has some interest in it.

The other common-law principle has to do with *quantum meruit*; that is, I lived with you in a common-law relationship, I worked on your house, I painted the rooms, I paid for the eavestroughing, and I want my money back. So that is another provincial common-law principle that is applied in non-matrimonial situations.

The application to first nations situations is very different. The land is not owned in fee simple by an individual. Off reserve, land is usually held by an individual, or it can be held by the Crown, but on reserve there is no ownership in fee simple, so you don't own the land and you can't sell it or pass it on, or a court can't order that it be transferred to someone else.

● (1115)

The land is not owned by the first nation government either; it's actually owned by the Crown. First nations governments generally have the use of that land and the management of it, but there are limits in that management.

On housing, the band designates who can have a house. I'm a member of the Lac La Croix Neguaguon Lake First Nation, and I can recall at my mother-in-law's house there were 27 people living in a three-bedroom bungalow when I lived there. Then my mother-in-law was designated a home by the band, so she moved with eight of those individuals to a new home, which was 20 x 20 in size.

So the band determines who gets a house and when it's being built. Usually after that there isn't much change. But in some communities, when there's been a change of government, there's been a change in who gets a house, prior to them being built.

In some places all of the land is totally communal. I can recall at my mother-in-law's new house that right up to the doorstep belonged to everyone. There was no yard. The land itself belonged to everyone. So for a court to determine whether that is going to be given to one spouse or the other is very difficult.

In some communities, particularly in southern Ontario, there are things called certificates of possession, which are sort of subsequent to certificates of location. Certificates of possession mean that you do have some beneficial interest in a piece of land, and the piece of land is usually designated. You can tell what is your lot. So in communities that have been divided into lots, or where there's an identified piece of land, you can have a certificate of possession. Those can be passed on through a will to another member of the family. A bit of alienation is allowed with a certificate of possession, so that's another variation.

So you have communal, certificates of possession, and then you have traditional land systems. For example, the Mohawk pass on land through their own traditional system, outside the context of the Indian Act.

On land allotment, more and more bands are opting for subdivisions that have lots, and that land allotment can be done by bands. Historically, however, it appears that most certificates of possession are held by male members of the community. The transfer of those certificates of possession does not require spousal consent, so on separation one of the spouses could pass it to another member of the family and thus defeat any claims by the other spouse on any possession of that property.

There are many political issues on first nations territory. When it comes to families, marriage, and the context of the family and raising children, first nations I work with will resist government interference in decision-making in that small nuclear family as much as possible because it is so personal. It starts with the nuclear family and works its way to the community. In the communities I deal with, they have particular ideas about the roles of men and women.

So there are all kinds of political issues related to the extent of first nations governance with this issue. It goes to the heart of what people feel is their culture and their decision-making about their own lives.

● (1120)

I can give you an example of a situation I have had in a case. I had a woman who lived in a very isolated fly-in community. The community has about 1,200 people. She was the mother of three children. She had always stayed at home. Her husband worked. She did not speak English. She was very traditional—that is, wearing the long dresses—and was very traditional in her marriage. It was a very fundamentalist Christian community.

She decided, for reasons related to the safety of her children and herself, that she wanted to leave her husband. When she told him this, he went to the chief in council, who went to the police. The police are managed and hired by the chief in council. He went to the police, who attended at the home. They told her she had to leave and that she had to leave the children behind. So she had to move in with her parents. She received no support from the husband. She was not able to get her children, and as the months went by until she could obtain counsel, the issue then became that the children were still in the same home with the husband. He'd had time to show that he should be taking care of the children.

She did not have those alternatives that we have outside the first nations community—that is, first of all, there was not even-handedness, or at least non-involvement, by the police and the chief in council. So that's by the political and the policing agencies in the community.

She did not have the alternative to go before a judge to ask that she be granted not only custody but also possession of the home. Later, a judge commented that he did not want to see the children removed from the house in which they lived, so that became a tremendous impediment to that case, aside from the fact of even access to justice when you don't speak the language, when you have no money, and you live 1,000 kilometres away from any centre where there is a lawyer. Those are all other issues related to access to justice.

So I see it as something that really needs to be addressed, and in consideration also that many northern communities do not have any shelters for women to go to when there is domestic violence, the home takes on even more importance.

I'm going to give you a brief outline of what I think could or should be done to deal with this.

I think there needs to be, first of all, an immediate mechanism for emergency relief. That is perhaps a regulation to the Indian Act, but something that will allow for a court application for possession of the house on reserve immediately, regardless of what the marital status is, whether it's a marriage or a common-law relationship.

I can recall, for example, my brother-in-law and sister-in-law who were married for probably 58 years, and they had never attended before a minister or a justice of the peace or had it recognized by anyone. They became married traditionally.

So to overcome all those differences that there may be on reserve, I think there should be a way, when you have a relationship and you have been living in a home, to apply to the court immediately for possession of the home, along with other relief that you would be seeking, which would be custody of children, if there are any.

Secondly, in regard to the issue of legislation, again, I don't believe imposing legislation is going to work as well as another process, and that is the process that was used by the government in regard to the issue of membership. As I recall, what the government did in regard to membership is that we do have a membership code. You have two years to develop your own, and if you don't develop it within that timeline, the legislation will be imposed. This allows for those who have traditional methods of dealing with the issue. For example, I'm thinking again of the Mohawks. The woman, in that case, is entitled to everything in the house and the house itself.

● (1125)

There's no sense in imposing legislation that is going to change that tradition, but if you have a time period, a couple of years, that allows for traditional communities to put forward their rules in writing. That is a difficulty, of course, because first nations don't like to have to articulate things that have been done by word of mouth and through oral tradition, but it is something that will need to be done for the future, and allowing the first nations to develop their own legislation does show respect and deals with the variety of situations.

There needs to be an appeal mechanism, either to a tribal council or to a court, so that it goes beyond the band level, and there need to be established principles of equality as guidelines.

There is a resistance to the application of the principles, for example, of the Canadian Human Rights Code on reserve. In the communities I deal with, the expectation of behaviour of women is very strong and very traditional. A woman would never contradict her husband. She would never disobey him. It's a very fundamentalist situation, and there will be resistance to the principles of equality that say that either party is entitled to possession of the home, for example, but I think those principles have to be established by the government and set out as the structure within which the first nations can put their traditional views, but I think that's the more difficult part of the equation.

● (1130)

The Chair: Ms. MacKinnon, I would like to give at least one round of questioning, so perhaps you could wrap up. You can cover the rest through the answers with the members.

Is that it for your presentation?

Ms. Danalyn MacKinnon: I have two more points. I'll just make them very quickly then.

One is that in regard to the house as an asset for division, when it comes to market value, as I've said, perhaps the value could be determined by bands. What's the house worth? It's set out ahead of time, long before anybody is going to separate. So when they separate, everybody knows that's the value of the home.

Should the certificate of possession be expanded to include other communities? I think that is very dangerous in communal reserves, and the reason is this: the idea of the communal concept of property. When I went to live in a communal first nation community, I found dealing with this idea that all the land belonged to everyone to be very difficult, but it is inherent in the fabric of those communities, and to change that I think would be very difficult.

The Chair: Thank you very much, Ms. MacKinnon.

I think we are going to have time for just one round of questioning. So we'll start with the Conservatives, represented by Mr. Lunn.

Mr. Gary Lunn (Saanich—Gulf Islands, CPC): Thank you, Madam Chair.

After listening to your presentation, I just want to say that I experienced similar situations before I was elected to Parliament. I lived on four reserves, and there were cases where women in particular would be living in very abusive situations and would have no place to go, largely because of many of the reasons you outlined. They weren't able to leave those situations because they didn't believe they had a home. They wanted to be with their children. There was no way they could use the process of off-reserve lands to get possession of the matrimonial home.

I always like to focus on solutions. I was pleased to hear your suggestion of the court application for the possession of the house on Indian land. At least to my knowledge, most first nations land is held by a CP, a certificate of possession.

I want to expand on when you've moved to a fee simple. I heard you say it's inherent in the fabric of those communities. So you might have answered my question. You were absolutely right when you said earlier that for many families it is the single largest asset or the largest amount of equity in any piece of material property.

If you continue with the certificate of possession, is it a temporary solution just going to ask for application from the courts?

I struggle with this because it's a genuine problem, I think, just calling a spade a spade. Generally, the women are put in a position of unfairness, and they're in the abusive situation. I don't like to stereotype, but that's what I've seen. So I'd like you to expand on that. Is the solution going to fee simple from CP so they actually can have some value? I appreciate it's not the case in all communities, but in many communities there's a lot of value in that land.

● (1135)

Ms. Danalyn MacKinnon: With regard to the certificates of possession—and that is just a certificate of possession of that lot—the underlying ownership is still communal even in those communities. I don't think the communities would be willing to give that up to move to a fee simple, where the certificate of possession owner actually owns the land and can sell it and mortgage it, the same as anyone else with fee simple would be able to. I don't think the communities will ever go for that. It's like being a joint owner with a lot of other people in a summer cottage, for example. Everybody owns it together. Nobody wants to give that up, really.

Mr. Gary Lunn: Again, I'm looking for solutions. How do you get a division of property? You say the band should place the value on the residence.

Ms. Danalyn MacKinnon: I think the tribal council or the band, which would be the first stop—and then there's always an appeal to the court when you need to—should be allowed the authority to transfer it when there is a separation of the parties.

Mr. Gary Lunn: So the provincial courts would be given the power to overrule the bands if they believed it was in the best interests in the situation.

Ms. Danalyn MacKinnon: I think the appeal would be to the federally appointed superior courts.

Mr. Gary Lunn: The Supreme Court, right.

Ms. Danalyn MacKinnon: Yes. That's where appeals of issues dealing with individuals and their bands go now. I think there should be some authority either in that court or in the Federal Court to deal with it. The only thing is that the Federal Court is more difficult to access. But there would be at least some court involvement on an appeal basis or perhaps just going directly to a court. When an application is made for custody, a party may apply for possession of a home located on a first nation territory.

Mr. Gary Lunn: I will just wrap up very quickly.

I hear what you are saying. I actually think that's not a bad solution, although the holes I see in it are that in most marriage breakdowns or separations of common-law people, the courts will generally leave the matrimonial home to either spouse, so it's probably the one that's going to have the custody of the children, at least on a temporary basis. But at some point in time down the road in the process there is some division of the assets. We still haven't got to that because there is no ownership. It's got to go to one or the other, not to both.

What's the long-term solution in the breakdown of a relationship?

Ms. Danalyn MacKinnon: Well, I think the difficulty is all of those other provincial ways of dealing with it as an asset, an asset that has value, have to do with where the value is determined from. It's a market value, right, and there is really no market value for homes in certain circumstances.

Mr. Gary Lunn: In these specific ones, but I think—

Ms. Danalyn MacKinnon: Unless there are—

● (1140)

Mr. Gary Lunn: Where I come from there is a huge market value, and depending on the location—and that's going to vary widely in communities both on and off aboriginal lands—

Ms. Danalyn MacKinnon: That's right.

Mr. Gary Lunn: —right across the country. But there is market value, for sure, with varying degrees.

Ms. Danalyn MacKinnon: You have to have a type of legislation that's going to deal with both of those circumstances. So if there is a market value and it can be determined, then that's what will be applied. The spouse who wants to keep the house will pay the other one half, or however it works out.

Mr. Gary Lunn: Yes.

Ms. Danalyn MacKinnon: If a market value can be determined, then it should be applied. If one can't be, it's possible, I suppose—and I'm suggesting that it be done at some point—that bands have to value the homes that are on the reserve in any event.

Mr. Gary Lunn: Thank you, Madam Chair.

The Chair: Thank you.

We now move to Mr. Cleary for the Bloc.

[*Translation*]

Mr. Bernard Cleary (Louis-Saint-Laurent, BQ): I want to say I'm very pleased to meet you and hear you, first because I come from a reserve and, second, because you have legal training.

Ultimately, whether we like it or not, this problem is legal in nature. Solutions have to be found, even though they might displease some. We'll never manage to find solutions without changing things. Changing things could produce effects. Our role is mainly to assess their force and negative consequences. I believe a person like you can give us some serious clues to follow. You've already done it. I believe that will be a great help to us.

You can't make an omelette without breaking some eggs. We'll have to take actions that will displease some people. We know perfectly well that, if we're not ready to do that, that means we're not ready to find a solution to the problem of people who are disadvantaged in the present situation. I must tell you that I live on a reserve and I have a house there. So I'm a bit familiar with the problem. This tough fight will require some people to shoulder their responsibilities and try to find solutions. I'm never comfortable using this term, but we may also have to impose solutions, since the common good is what we have to aim for. I believe all Aboriginal women want us to find that kind of solution.

First, I'd like you to tell me whether you think my view of matters is accurate. Should we impose things, even if that disturbs people, or should we leave the file open for generations to come, while people continue to suffer from these problems? You can't not have thought about these issues. I'd like to hear, not the lawyer's point of view, but the sincere view of a person who is an Indian, who has lived on a reserve, who is familiar with the problems that entails and who uses a legal approach to guide her thinking.

I'd like you to give me your comments as an Aboriginal person; you'll refer only to your own code.

● (1145)

[*English*]

Ms. Danalyn MacKinnon: I agree that inaction is the enemy. I say that because I have to deal with separation issues related to children and their parents. Tragedies occur because there is no other mechanism for the parties to deal with the matter.

A woman who is going to leave her husband in a violent situation knows she can't stay in the home. This is a big sacrifice to make for children who live in communities where their relatives and friends are, where they go to school. The mother has to make that decision for the children. I am saying "mother" because that is the usual case I deal with. This decision is very difficult. She has to go to a completely foreign country, someplace outside the reserve, if she wants them to survive. This is not an easy thing.

As to whether there should be law imposed here, I don't think the matter can remain vague. I think something has to be done, but it is always better when you are going to do things if you can walk arm in arm down the road with other people. Perhaps there should be an interim measure that indicates the action the government is going to take and that sets out the process. People would have to understand that the action is a temporary measure, that we want to allow communities to develop their own approaches. Where community approaches are not developed, however, ours would be available as a final measure. This is a possibility.

The Chair: We now move on to the New Democratic Party, Mr. Pat Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you very much for a very interesting presentation. The subject is unbelievably complex. The deeper we dig, the more we realize how complex it is. You have identified very thoroughly some of the problems we have.

You raised the matter of jurisdiction—provincial, federal, cross-over. Our committee, however, has to be cognizant of the third area of jurisdiction, which is first nations self-governance, at least in family law. That has to be our primary area. We have to be especially sensitive on this issue if we are going to be true to the idea that this government believes in the right to self-determination and the right to self-governance.

One of your recommendations was a model similar to the First Nations Governance Act proposal. Under this proposal, first nations were to have two years to establish a code comparable with provincial or federal standards. If they didn't come up with their own code within that timeline, we were to impose a code. That was how they dealt with membership and election processes in the First Nations Governance Act. It caused a backlash that was almost unprecedented right across the country. People resented the imposition. They pointed out the contradiction. You can't say you are in favour of self-determination and at the same time threaten to impose, within a two-year timeframe, something determined outside the community.

I am not trying to be difficult. I don't know how we as a committee could repeat the same mistake that was rejected so unanimously before.

I would ask you to speak to how this might be introduced without fanning the flames of discontent across the country.

● (1150)

Ms. Danalyn MacKinnon: I think dealing with the First Nations Governance Act was a little bit different because that does go to the heart of self-government. It was particular about what its expectations were, what first nations governments would do. And that particularity, I think, is what caused a lot of the difficulty with that act. It specified exactly what components had to be in the government of the people, and some of those ideas were totally contrary to the traditional view of governance within communities.

So I'm not saying to do this where there is a possibility of a backlash. Of course, involving people early in the process, even of developing the legislation, is always preferred, because then they become invested in having developed a piece of legislation they feel could work in their communities or across the country. If you don't have time for that, then sometimes you have to impose some type of law, at least as a temporary emergency measure.

I think allowing a couple of years to work on the legislation.... The more particular the components are, the less likely first nations are going to feel you are really giving them the two years to develop their own process, or to at least articulate the process they do have.

It has to be broad-brush concepts, I think.

Mr. Pat Martin: But you'd be given two years to develop a code that met the standards set out by the government: as long as your code looks exactly like what we would impose on you, we won't impose it on you, but if you fall short of what our vision is of how your community should be run, we will impose it on you. That's going to be met with enormous resistance.

Ms. Danalyn MacKinnon: I think, at least with the communities I deal with, the greatest resistance would have to do with the ownership, for example, of a house, at all, by a female.

Mr. Pat Martin: Really.

Ms. Danalyn MacKinnon: The reason I say there have to be some basic principles, even if it's just the Canadian Human Rights Act idea of some equality.... But there are communities where that does not currently exist.

Mr. Pat Martin: There is some rumbling out there, even as our committee goes into this study, that the government is trying to steer them towards an objective it already has in mind, that there is a predetermined objective that even this study, and even the selection of witnesses, is trying to steer them towards. That's been raised with me out there.

We have just finished—"we", the Government of Canada—a comprehensive analysis of this with the Senate. Do you think the Senate's interim report, based on its study, has some recommendations you would see as being helpful?

Ms. Danalyn MacKinnon: I am not familiar with it, so I couldn't say.

Mr. Pat Martin: I see. How about the royal commission?

Ms. Danalyn MacKinnon: On self-governance?

Mr. Pat Martin: The royal commission had some very specific recommendations about self-governance or family law being under the direction and control of—

Ms. Danalyn MacKinnon: Well, I think, as I recall, their recommendations were more geared to it being within the control of the band itself or the tribal council.

You know, all these things are preferred, that communities themselves.... There are communities where women have very high status and do not suffer these things, these difficulties. So it would not be fair to say that in those communities there must be forced legislation. The communities have somehow managed to develop their own methods of doing things that appears to be satisfactory to them.

We can wait another 20 years until some communities get up to a level where they have developed their own, through the history of the community, I guess. From my point of view, something needs to be done more immediately than that, and then that process can still take place as it goes along.

The political reality of having the reaction of the communities is that the more time you have to deal with putting together this legislation with the communities, the less backlash there will be.

● (1155)

The Chair: Thank you very much.

We'll now move on to Mr. Valley, from the government side.

Mr. Roger Valley (Kenora, Lib.): Thank you, Ms. MacKinnon, for coming today. I know somewhat the travel you had to endure to get down here.

I have a couple of questions. We know it's all about balancing individual rights and collective rights, and the challenges are there. But for the rest of the committee, some of the facts you have to deal with, which a lot of people wouldn't know in Canada, are that we have a lot of remote sites, but the most remote sites are in the area in which you work, right in central Canada, not in the far north, but right there in northern Ontario, probably 30 to 35 remote communities that have little or no access to the outside. It's extremely difficult.

Perhaps you could just briefly tell us—and we can imagine it, but you work with it—in a rural or urban reserve setting, the pressure that's on the spouse when she has to move out of the home, off, as you call it, to an alien country, or I'm not sure how you phrased it, the difficulty she has, and she might only move 10 miles or 10 kilometres to an urban setting, like the community you're from, Dryden, being the communities of Eagle Lake or Wabigoon. How difficult is that, let alone moving 1,500 kilometres to a community she's never heard of and knows no one and can't speak the language? Can you tell us something of what you see in that challenge?

Ms. Danalyn MacKinnon: As I said, I'll deal first with the remote areas. When people are living in their communities, as you've described, that you and I are familiar with, they don't speak English, for example. There are no programs in communities that they move to when they have to move out of the community. There are no programs for them, as there would be if they were an immigrant from another country who moved to Canada. There aren't any programs to learn English or to help in getting settled in. Everything is foreign.

I remember a family that moved next door to me in Dryden. At night the children were always out playing, and someone spoke to me about it. I knew immediately that the children had come from up north. They were always out playing on the street because there was no recognition of any boundaries between their property or mine, or the street, and there's a different way of dealing with children.

Suddenly they moved to a community where, first of all, they're expected to be the nuclear family. They're supposed to be disciplining their children and they're supposed to know all these rules, like children don't cross the boundary into someone else's property. There are all kinds of little rules we have about how we live together in an urban area. So when people come from up north, they don't know any of those cultural things that we have all gotten used to. They don't have transportation. They don't speak the language. Sometimes particularly women have never been to the store, other than the store in their own community, which is just a little store that somebody they know works in.

It's everything. They're taking their children from a community where they speak their own language all the time, and they're having to come to a community where it's English and people dress differently.

The women I deal with wear long dresses. They have long hair. They're not allowed to wear makeup or anything like that. It's a very different culture. So when they come from the far north, I see them on the streets of the urban area and everything is a difficulty, even applying for assistance or how to find a doctor, where to go if you need one, any of those things, just the coping skills of living in an urban area. It's very difficult.

If they live in a closer rural area—for example, around the towns in northwestern Ontario—at least they have transportation, or they have a lot of those other things under control if they come from a less remote area. But when they come from a remote area, everything is foreign, and they're going to be subjecting their children to it. That's something they know, and I find very often that they will go home just because of the unhappiness of their children having to live in a community that doesn't understand them, and the children find it very difficult.

● (1200)

Mr. Roger Valley: You mentioned an alien land. Just very quickly, I'll tell the committee, we live in the country of the Ojibway. Above us to the north are the Cree. So when they come down, they can't even speak to the natives who are there.

Ms. Danalyn MacKinnon: Yes.

Mr. Roger Valley: I have sat in rooms where there is a mother and three or four children, who just sit there and take so much, and they are all crying. It is a horrible situation. We have allowed this to happen.

I will be quick. I want to get to the point that with all the reasons we can look back and blame everyone, for the last 20 years we have done nothing. You use words like “immediate”. If we do some things immediately, we may make some mistakes, but we have to correct some of these problems.

You mentioned two years, and that's a concern of mine. You talked about the program in which they did membership. Do we have the capacity in those communities to deal with this in two years, just thinking of those remote sites?

Ms. Danalyn MacKinnon: When I speak about the immediate needs, I think something should be done right away by the federal government in some kind of legislation, so that you can immediately get possession of a home so you don't have to leave the community with your family.

That's for possession of the home, but when it comes to possession and the value of the home on separation as an asset, as money that is going to give you a start somewhere else, I think all of that is going to take a longer period of time.

When it comes to the membership issue, and that was how this membership issue was dealt with by the government, we have a membership code, or we have a membership scheme. You have two years to put your membership together, and if you don't, then ours applies. What I found is for communities that couldn't get together on too many other things, boy, they wanted to get that membership code done. They didn't want the other one to apply because they saw lots of problems with it.

So I think if they don't like the legislation that you can put forward to them, they will work hard to get that done, and if they can't bring the community together enough for that consensus, then I think that's the community's difficulty.

Mr. Roger Valley: In this committee we have spent a lot of time agonizing and listening to testimony of issues that went wrong decades and decades ago. We have one right in front of us, and as Mr. Cleary pointed out, you can't make an omelette without breaking some eggs. I think we should take some action. It has to be quick, and I think it is something that we may not get exactly right, but I think we need to do it because we are breaking up those homes daily as we speak.

You spoke of one instance, and every community.... All of us have communities in our ridings that this has happened to, but I would like to give my last couple of minutes to the—

The Chair: You don't have any to give away.

Mr. Roger Valley: I knew better than to ask.

The Chair: I want to thank our witness.

I am from the far north, which is Nunavut, and I am always interested in hearing someone's reference to the far north and realize that it's really Ontario.

Mr. Gary Lunn: They're past the north.

The Chair: Thank you very much for your presentation this morning. It is certainly welcome to our committee, I know, as we deal with this very serious issue. The suggestions you have will certainly be part of the discussions we have for this study.

Ms. Danalyn MacKinnon: Thank you very much.

The Chair: I am going to suspend for one minute to get the other witnesses to the table.

● (1204)

(Pause)

● (1216)

The Chair: Let's get the meeting back to order.

For the second hour we have witnesses from the Department of Indian Affairs. My understanding is that Mr. Paul Fauteux and Maureen McPhee will be speaking, and the rest of your group will help you answer some questions.

Maybe you can start, Mr. Fauteux, and introduce the people who are with you.

Mr. Paul Fauteux (Director General, Lands Branch, Department of Indian Affairs and Northern Development): I would be happy to start, if that is the pleasure of the committee.

The Chair: Your name is first on my list.

Mr. Paul Fauteux: Okay. I'm happy to defer to my colleague, Ms. McPhee, if she prefers to start.

Ms. Maureen McPhee (Director General, Self-Government Branch, Department of Indian Affairs and Northern Development): I'll make the introductions, and then we can go in whatever order you think best.

Good afternoon. First of all, I'd like to introduce myself and my colleagues from the Department of Indian Affairs and Northern Development. I am Maureen McPhee, the director general of self-government. I am joined by Bernadette Macleod, legal counsel for self-government; Wendy Cornet, special adviser to the department; Paul Fauteux, director general of lands; and Bruce Cooper and Cindy Calvert, senior policy analysts.

Paul and I will each give you a short presentation on how issues related to matrimonial real property are addressed in the First Nations Land Management Act and the self-government agreement.

Mr. Paul Fauteux: Thank you, Maureen.

[*Translation*]

Madam Chair, ladies and gentlemen members of the committee, I'll make my statement in English, but I'll be very pleased to answer your questions in the official language of your choice.

[*English*]

I have been asked to speak to you today on reserve land allotment, both under and outside of the Indian Act, and on the First Nations Land Management Act in the context of matrimonial real property.

The Indian Act land management regime is designed to ensure the continuing protection of each band's collective interests in Indian Act reserve land against permanent alienation to non-band members. The basic principle of reserve land allotment under the Indian Act is that only band members, including men, women, and children, have the right to obtain lawful possession of reserve lands. Section 20 of the Indian Act allows a band council, with the approval of the minister, to allot land to a band member. A certificate of possession is issued as evidence of lawful possession. Once an allotment is made and approved, there are relatively few ways in which either the band or the minister could affect the individual's interest in the allotted land.

Some bands also make allotments of interest in reserve lands in a manner that does not follow the provisions of the Indian Act. These practices, known as custom or traditional allotments, vary from first nation to first nation. As the Indian Act process is not used in these cases, neither the minister nor the department is involved in these transactions, which are not registered in the department's reserve land register.

It is estimated that approximately half of first nations do not use the Indian Act allotment process, either because they have decided not to make allotments of individual interests in reserve lands at all and to keep all the lands collective, or because they are using some form of custom allotment.

I would now like to discuss the First Nations Land Management Act, which, unlike the Indian Act, specifically addresses matrimonial real property. This act received royal assent in 1999 and brought into force the framework agreement on first nations land management. The framework agreement was the outcome of a first nations-led initiative to provide a sectoral self-government alternative to the Indian Act for reserve land and resource management purposes.

Under the framework agreement and the act, signatory first nations opt out of the land management regime of the Indian Act and assume management and control of their land. Each first nation that becomes a party to the framework agreement must develop its own land code. Once ratified by the community, that code releases the first nation from the land management provisions of the Indian Act.

The framework agreement was signed by the minister and 14 first nations in 1996. The original draft did not address matrimonial real property. As a result of lobbying efforts on the part of aboriginal women and their organizations, the framework agreement was amended to include mandatory provisions on matrimonial real property.

The implementation of the framework agreement and the act is carried out cooperatively by Indian and Northern Affairs Canada and the Lands Advisory Board, the members of which are selected by first nations that are parties to the framework agreement. The board was established to help first nations make the transition from the Indian Act to the First Nations Land Management Act.

Both the framework agreement and the act contain specific provisions relating to the enactment of laws covering matrimonial real property on marriage breakdown.

A first nation becomes operational under the act once it ratifies its land code and enters into an individual transfer agreement with Canada. In its land code, an operational first nation must establish a community consultation process to develop general rules and procedures applicable to cases of marriage breakdown concerning the use, occupation, and possession of first nation land and the division of interests in that land. Within 12 months of the land code coming into force, the rules and procedures shall be incorporated into the first nations land code or laws. The framework agreement states that these rules shall not discriminate on the basis of sex.

First nations operating under the act are not obligated to adopt any rules concerning matrimonial real property during marriage, as opposed to in the event of marriage breakdown.

● (1220)

However, pursuant to the broader land management powers they assume under the act, first nations may choose to adopt land code provisions or laws that apply to matrimonial real property during marriage. So on the one hand, there's an obligation; on the other hand, there's an option.

The scope of any such provisions during marriage, as opposed to upon marriage breakdown, must of course properly fit within the scope of the act, meaning they must relate to the use or possession of land.

Of the 13 first nations currently operating under the act, five have enacted matrimonial real property laws. Of the remaining eight, five have missed the one-year deadline for enacting those laws. The Lands Advisory Board and the chiefs of operational first nations, two of whom are scheduled to appear before you next week, are best placed to explain why.

It is the operational first nations themselves that develop their real property laws with support and expertise provided by the Lands Advisory Board. INAC does not have a formal role in this process. Moreover, INAC does not have the authority under either the act or the framework agreement to set or enforce standards or guidelines for matrimonial real property laws beyond the requirement that they not discriminate on the basis of sex. Under this sectoral self-government initiative, each first nation determines for itself how it will deal with the issue of matrimonial real property.

You might wonder, in light of what I've just said, if the First Nations Land Management Act is the solution to the matrimonial real property problem. While the act does provide opportunities for first nations to assume management and control of their reserve land, taking on that responsibility is not a priority for many first nations who are struggling with and focusing on more urgent issues, such as poverty, unemployment, health, education, substandard housing, substance abuse, teen suicide, and family violence.

Participation in this initiative is driven by first nations. They indicate their interest in participating voluntarily. They are not chosen by the government, and they cannot be forced to sign the framework agreement. Opting out of the Indian Act and into the First Nations Land Management Act is a community decision. There's a ratification vote, as I mentioned earlier.

As I mentioned, of the 614 first nations in Canada, 13 are currently operational under the act. Another 22 are in the developmental phase that precedes a community vote on the land code, and some 50 others have shown interest in participating.

The current Treasury Board authority that governs this program allows for up to 15 new operational first nations each year. Although we anticipate that interest will grow over time, this process will not resolve the matrimonial real property problem for the vast majority of first nations that will remain under the land provisions of the Indian Act.

I thank you for your attention, and I'd be happy to answer any questions you may have.

● (1225)

The Chair: I think at this time we'll hear from Ms. McPhee, and then we'll go into the round of questioning.

Ms. Maureen McPhee: First,I'd like to thank you for the opportunity to speak to you today on how issues related to matrimonial real property are addressed in self-government agreements.

[*Translation*]

As you know, in 1995, the Government of Canada adopted its Inherent Right Policy, which provides a general recognition of the inherent right of self-government as an existing Aboriginal right. The goal of the policy is not to define the inherent right of self-government, but to reach practical and workable agreements on how self-government will be exercised within the Canadian constitutional framework.

[*English*]

To give practical effect to the inherent right of self-government, the Government of Canada recognizes that aboriginal governments will require the jurisdiction and authority to act in a number of areas within the overall framework of the Canadian Constitution. A self-government agreement must affirm that the Canadian Charter of Rights and Freedoms applies to all matters within the jurisdiction and authority of aboriginal governments to ensure that aboriginal and non-aboriginal Canadians may enjoy equally the rights and freedoms guaranteed by the charter.

[*Translation*]

With respect to matrimonial property, it is clear that the federal government does not want the status quo for Bands under the Indian Act to continue in the self-government context. Since the adoption of Canada's policy in 1995, our negotiators have been directed not to replicate the Indian Act regime in this regard.

[*English*]

To date, self-government agreements addressing aboriginal jurisdiction over land show three different approaches to treatment of matrimonial property. I would like to take you through the three.

The first is broad aboriginal jurisdiction over matrimonial property, real and personal. In this case the aboriginal government has broad jurisdiction over matrimonial property, as I said, both real and personal. This first approach permits the aboriginal governments to comprehensively address issues related to matrimonial property.

Where the lands are not reserve lands, in the case of a modern land claim agreement, for example, the provincial-territorial laws would apply until such time as the aboriginal government passes its laws.

Where the lands continue to be reserve lands, which can be the case in some self-government negotiations, the onus is on the aboriginal government to close the Indian Act gap as soon as possible by passing matrimonial property laws.

Agreements that follow this approach have included a requirement that the rights and protections that are provided in the area of matrimonial property be either equivalent or comparable to those rights and protections available under provincial or territorial law. An example of this approach is the Labrador Inuit land claims agreement that has been recently concluded.

A second approach is shared provincial or territorial aboriginal jurisdiction over matrimonial property. This approach attempts to address the Indian Act gap with respect to matrimonial real property. The agreements using this approach state that aboriginal jurisdiction is recognized only in relation to matrimonial real property. Provincial and territorial jurisdiction applies to address the balance of the matrimonial property issues, that is, issues other than real property, such as personal property. This latter part is achieved through provisions in the agreement stating that the provincial and territorial laws of general application apply. An example of this approach is the Westbank First Nation Self-Government Agreement, which came into force on April 1.

The third approach is to have provincial and territorial laws of general application apply to aboriginal lands. In this case the agreement recognizes aboriginal jurisdiction over aboriginal lands, but jurisdiction over matrimonial property is not explicitly addressed. This is as a result of the provisions in the agreement that address provincial and territorial laws of general application and relationship of laws. It is through this that provincial-territorial matrimonial property laws of general application will apply on the aboriginal lands.

This approach is suitable for only those lands that are not section 91.24 lands or lands reserved for Indians as per the Constitution Act, so this applies generally in the case of a modern land claims agreement where the lands are becoming section 92 lands.

A couple of examples of this approach would be the Nisga'a Final Agreement—and I know you have heard from Jim Aldridge recently on their approach—and the Tlicho agreement, which was recently passed.

These are three approaches used to date in self-government agreements to address these issues, but it is possible that deficiencies could continue to exist depending on several factors. These include whether or not the aboriginal group chooses to exercise its law-making authority within a reasonable period of time; whether or not the aboriginal group chooses to develop a law that addresses issues related to only matrimonial real property and not matrimonial personal property; and where the lands continue to be reserve lands, how section 89 of the Indian Act is addressed in the self-government agreement.

Section 89 of the act, which effectively provides for a restriction on mortgage and seizure of property located on reserves and belonging to Indians, can affect the enforcement of court orders, for example, compensation orders.

Section 89 of the act will cease to apply to aboriginal lands that are no longer reserve lands under the Indian Act; however, as I mentioned, there are instances in a self-government context where the lands do remain reserve lands. The Westbank example that I gave is a case in point. In those instances, the future application of section 89 is assessed by negotiators and the aboriginal party in the negotiations.

● (1230)

On the Westbank example the agreement recognizes the jurisdiction of the Westbank First Nation in regard to procedures for encumbering interest in Westbank lands, including rules affecting exemption referred to in section 89.

The Westbank First Nation will have jurisdiction to determine the future application of section 89 in relation to real property interest in their lands, but not in relation to personal property located on these reserves.

Matrimonial property is, of course, a very complex issue. Because of the significance of the issue for women and children in particular, we have adopted guidelines for our federal negotiators that provide background on the issue and guidance on how to address the issue in negotiations, and generally outline the three approaches I've mentioned.

I'd just like to thank you for giving me the opportunity to outlines these approaches, and we will take your questions.

The Chair: Thank you very much.

Since Sue has to leave a little earlier, we have agreement that she'll start the round of questioning, and we'll go back to the Bloc, I believe, as the second. So, Sue, go ahead, please.

● (1235)

Hon. Sue Barnes (London West, Lib.): Thank you very much to the official opposition for that agreement.

Thank you very much, Ms. McPhee. I just want to make sure that the point is understood that any self-government negotiations that are currently going forward from this time on, and actually for quite a while now, will now have the benefit of internal government guidelines on matrimonial real property. So to reach a self-government agreement, in essence, those self-governments will have to encompass dealing with this issue.

Ms. Maureen McPhee: That's right.

Hon. Sue Barnes: Okay. Thank you.

Mr. Fauteux, my understanding of the Land Management Act is that it's obviously a very good sectoral thing, but its application is limited by numbers and resources, and I think we need to address, as you said, the people most directly involved in that.

But my question to you is, is this available across the country? Can every first nation across the country access this act, and if not, why not?

Mr. Paul Fauteux: Thank you very much for that question. The answer is no, unfortunately, the act is not yet accessible to first nations in Quebec, and the reason is that the act embodies common-law property concepts that are not found in the Civil Code of Quebec. There has therefore been a need identified by our colleagues in the Department of Justice to bijuralize the act, to make it applicable to the Quebec legal system as it is applicable in the common-law legal system that applies in the other provinces. The Department of Justice is reviewing that issue, and we intend to move forward with it.

Hon. Sue Barnes: We heard testimony today from somebody who's working with the situation, and I've looked at your stats that show that of the first nations who have opted into the system, a number of those are in default within one year. I've also, in previous questions, brought out the fact that there are no teeth inside that piece of legislation. But in thinking about this, I'm not sure if the response should be to have a mechanism that brings teeth into it or maybe it's the fact that we're setting people up for failure because one year isn't sufficient time both to do a consultation and to develop.

Has thought ever been given to expanding that timeframe, or has anybody raised that with you? I've seen some very progressive first nations people put into this system who, I would have thought, would not allow that time to lapse. And I don't think it's so much a fault issue as much as an issue of determining what's actually required of them in terms of capacity. You know, there are not that many of them yet, so there's probably not the sharing of the codes, as different people develop their own.

Are there any conversations going on with first nations or with the institute that's set up to help this and the capacity? What's happening there?

Mr. Paul Fauteux: We have not received suggestions to modify the timeframe, to provide for more than a year from the adoption of the land code to the adoption of provisions on matrimonial real property.

However, as you suggest quite rightly, there are a number of obligations that must be met simultaneously within that first year, including, in addition to the obligation to consult the community on the content of the rules relating to matrimonial real property in the event of a marriage breakdown, the necessity to negotiate an environmental management agreement. Because, of course, in taking control over its land, the band is also taking control over managing the environmental aspects of the land. And that is another process that is subject to a requirement for consultation.

In addition, the band has to develop its capacity for land management, which means basic things like getting an office, hiring a line manager, staffing the office, and equipping the office. So there's a lot that needs to get done within that first year.

Again, as I said in my statement, I think the chiefs of the operational first nations who will be appearing before you next week will be better placed than I to give you an insider's view of what those problems are. That is our general understanding from the Lands Advisory Board, but we have not received a request for modifying the timeframe as of yet.

Hon. Sue Barnes: Okay.

To Ms. Cornet, in a prior meeting, somebody asked the Justice officials what were the options potentially out there. I know you have been an expert person advising the department and would probably be most aware of whatever options could be out there—at least those options discussed internally right now, but maybe not all the options that somebody external to INAC may have in their head and may raise that we haven't heard from yet.

Are you comfortable at this point in time in saying, if you had your druthers...? Or not even prioritizing them, what are the options out there?

● (1240)

Ms. Wendy Cornet (Special Advisor, Department of Indian Affairs and Northern Development): I think the options we've looked at are ones that have been brought forward by either previous witnesses in other proceedings or expert reports, such as by the Royal Commission on Aboriginal Peoples.

What you see from the ideas that have come forward from previous hearings and reports is a spectrum of options, with varying roles for the federal government, first nations law, and provincial law to address this gap. One end of the spectrum would be represented by the recommendations of the royal commission, which concluded that there was an inherent right of self-government that could be exercised, preferably through negotiated self-government agreements, and that it was also possible to exercise that independently of a self-government agreement, including jurisdiction in relation to family law and matrimonial real property. So that's at one end of the spectrum.

Another option that's been recommended—and I think the Senate standing committee suggested this was a possibility—was incorporation by reference of provincial law through federal legislation. If that were done alone, of course, it would provide the most minimal involvement in terms of first nations activity.

A third option would perhaps be to combine the two aspects. You could perhaps recognize both first nations jurisdiction in some manner or other and also have some form of incorporation of provincial law, pending the actual adoption under first nations jurisdiction of their own matrimonial property law.

Each of these options would have advantages and disadvantages. I could go into those at a later point, as I don't want to use up too much of your time.

Hon. Sue Barnes: No, I'd like you to expand on them.

The Chair: Do we have agreement from the members, because we are now at the seven-minute mark?

Hon. Sue Barnes: Well, that's fine.

The Chair: Maybe one of the other members can ask her to carry on.

I now go to Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: Thank you, Madam Chair.

I'm trying to understand. You can no doubt explain to me and correct me if I've misunderstood. It seems to me these issues will theoretically be included within the framework of an agreement on self-government. Consequently, it is the department's aim that these issues be addressed in the context of a self-government agreement.

I know a lot about the self-government issue because I negotiated it for 25 years. To my knowledge, the starting point of self-government negotiations is the self-government policy of the Government of Canada or of the Department of Indian and Northern Affairs Canada.

The government's policy is very specific on all issues. I suppose it must be so on self-government as well. If the policy isn't clear enough, the instructions you give your negotiators are, as Ms. McPhee said. Those instructions are, in a way, the framework in which they are required to negotiate. So much the better for them because the framework is defined, and they can't go outside it. However, Indians can't go outside the self-government framework either, and that's unfortunate.

Ultimately, that means that—correct me if necessary, because I'm interpreting, but this is what I understand—the Department of Indian and Northern Affairs Canada will have a considerable influence on everything that's negotiated regarding the rules on matrimonial property. I'm not making a major criticism. I'm making an observation: there are limits and they're clear.

When you say that people will decide on what they put in their policy on matrimonial property, that makes me laugh. They'll approve what the government suggests to them regarding the policy on matrimonial property. I don't conclude from that that it's a bad deal. It's not that it at all. I also conclude that people won't be able to add things indefinitely, if they're not part of the policy. I'm not saying that the dice are loaded. That's not what I mean.

When you're not familiar with this entire process, you become convinced that Indians will negotiate whatever they want with regard to matrimonial property. Nothing could be further from the truth. Everything that's done at the Department of Indian and Northern Affairs is always done within the framework of some policy. God knows the policy book must be thick at the Department of Indian and Northern Affairs Canada. You obviously touch on a lot of things, on the one hand, and you make policies on a lot of things, on the other.

That's all well and good. However, I'd like the departmental people to tell me whether we can move outside this nice framework to address issues that may not have been thought of or discussed. Do the communities have an opportunity, in the context of their self-government agreement, to propose things that might go beyond the framework of the policies of the Department of Indian and Northern Affairs Canada?

● (1245)

[*English*]

Ms. Maureen McPhee: I will respond to a couple of things.

First of all, the guidelines are not developed solely by the Department of Indian Affairs, but by all departments, and these are approved by a federal steering committee that guides negotiations. So they are basically federal guidelines, not the guidelines of the Department of Indian Affairs.

Secondly, the three approaches I have outlined are those that have been developed at the tables to date with the negotiating groups. There is flexibility within the guidelines to consider other approaches, if those are developed. So the guidelines are not the end of the story; there is the possibility of developing with aboriginal parties at the tables other approaches that may also meet the interests of all.

[*Translation*]

Mr. Bernard Cleary: You should have told me that 25 years ago. Then I might have been able to negotiate something better. But I didn't have to ask myself any questions. I'm not saying I wasn't good; I was an excellent negotiator.

Mr. Paul Fauteux: No doubt.

Mr. Bernard Cleary: This question is important for me. As my grandmother used to say, you can really sew with new material. It hasn't been used. We'd really like to sew something good, that is to say find all the necessary answers. It will be long and difficult. When we address the solutions, of course, we want them to be as comprehensive as possible in order to cover most of the problem, since we'll never be able to cover everything.

That's the gist of my question. I'm not trying to say the instructions aren't good. That has nothing to do with it. We want to see how to go as far as possible. My question is only about that, and I don't think Ms. McPhee answered it. I'd like a clearer answer, and I'd like you to tell your negotiators that certain subjects may go beyond the policies, that they'll have to be addressed with an open mind and that you'll have to approve them with an open mind.

● (1250)

[*English*]

Ms. Maureen McPhee: With respect to the guidelines on matrimonial real property, it's stated clearly to the negotiators that these are guidelines that identify approaches developed to date, but there is flexibility for the negotiators to develop other approaches and to bring those forward for approval as well.

The Chair: Thank you very much.

We will now go to Mr. Harrison, please, and thank you for your cooperation.

Mr. Jeremy Harrison (Desnethé—Missinippi—Churchill River, CPC): Thank you very much, Madam Chair.

Thank you to our witnesses for being here.

The original question I wanted to ask was with regard to what discussions had taken place within the department regarding matrimonial real property options. I know this was partly answered already, but I'd appreciate it if you could recap briefly the discussions that have taken place within the department on the options and indicate whether there's any preference within the department among those options.

I know, Ms. Cornet, you said you would be able to go through the advantages and disadvantages of the options. I'd appreciate it if you could maybe expand on this as well.

Ms. Wendy Cornet: I'll start maybe with the last part of your question, the advantages and the disadvantages. There wouldn't be a preference at this point because this committee has been asked to provide direction, some advice, to the minister on where to go. So certainly it wouldn't be the department's place, as I understand it, to have a preference at this point.

In terms of the advantages and disadvantages, one of the options that's been very frequently put forward, and the Senate Standing Committee on Human Rights suggested it.... Several native women's organizations have suggested that a solution may involve federal legislation in some form or another, incorporating, by reference, provincial law in this area to address matrimonial real property issues.

The advantages and disadvantages of that approach would be that it would address individual rights concerns, obviously, but it wouldn't necessarily speak to self-government objectives, and in fact it would probably raise some self-government concerns.

An advantage would be that it would obviously provide greater access to rights and remedies than are available now, and those would be provided as quickly as Parliament was able to pass such legislation.

A disadvantage, or at least, at minimum, an issue you would have to deal with, is that such a move would depart from a century or more of policy that has, to date, shielded Indian reserve lands as lands from the application of provincial laws. As far as I know, there isn't any previous example of that happening. In addition, you do have the fact that the existing provision in the Indian Act does incorporate provincial laws to some extent. Section 88 is certainly not well loved by many first nations in the country, and I would imagine they would have a similar reaction to another provision doing something similar, but that would be for them to determine.

You would also, at the end of the day, have to answer the question on how such a measure...what its relationship would be to section 35 aboriginal and treaty rights.

If you went the route that the royal commission was recommending, which was some form of recognition approach, recognition of inherent jurisdiction, however quickly that was able to happen—obviously people wouldn't necessarily move all at the same pace—you would still have the question of how immediately you can get remedies and rights available to people, given different processes and a different pace in moving towards self-government. Obviously it would be more consistent with section 35, and of course, this would involve a major shift in federal policy, and that's something perhaps that this committee is better advised to give advice to the government on.

The third approach of somehow combining a recognition approach, whether it involves delegation or recognition of jurisdiction with incorporation by reference is another possible option. And I think it was raised previously by some witnesses that one approach would be to have some form of recognition of first nations jurisdiction over matrimonial real property, and in the interim, until that jurisdiction was exercised, provincial law could be incorporated, by reference, to apply until first nations laws were in place. The disadvantage to this approach is that again you are dealing with the kind of fallback position that has been criticized in the past. It would actually combine all of the disadvantages and advantages of the two approaches I previously mentioned. It would arguably balance the need to respect both individual and collective rights.

Finally, I would just say that in regard to any of these options, they all basically involve significant policy issues that could have broader implications. This is precisely why presumably this committee has been asked to give advice to the minister. It's because no matter which option you pick, there are some significant policy decisions to be made.

● (1255)

Mr. Jeremy Harrison: Thank you.

I understand that in other self-government processes, particularly the comprehensive agreement in principle between Manitoba and the Sioux Valley Dakota Nation and between the Meadow Lake Tribal Council, which actually happens to be located in my home town in Meadow Lake, and Saskatchewan, I understand that these agreements in principle have dealt with or made provision for the future discussion of matrimonial real property issues.

I am wondering if any of our witnesses could comment and expand on that.

Ms. Maureen McPhee: Yes. I was actually a negotiator on the Meadow Lake Tribal Council negotiations quite some time ago. The Meadow Lake approach is a broad jurisdiction approach. It is clearly spelled out in the agreement that they have jurisdiction over matrimonial real property; it is dealt with. It would be under the first option I described in my presentation, a broad jurisdictional approach.

Mr. Jeremy Harrison: Thank you.

The Chair: Are you done, Mr. Harrison?

Mr. Jeremy Harrison: Yes, thank you.

The Chair: I think it would be helpful to the committee if the committee had access to what Wendy has put in her presentation—the advantages and disadvantages. Could we get the department to give that to the committee? I think that was the information Sue was asking for when she ran out of time.

Ms. Wendy Cornet: Okay.

The Chair: There is a very little bit of time left. I think Mr. Smith wanted to ask one question.

Mr. David Smith (Pontiac, Lib.): Mrs. Chair, you have asked exactly the question I wanted to ask, so I thank you for that insight.

I will share my time with my colleague Roger. He has a question.

Mr. Roger Valley: Thank you.

Earlier today, when the other presenter who was here, one of the opposition MPs made a statement that we had a hidden agenda to drive this all towards a fee simple solution. Could you comment on that? It is news to me. I have had my briefings and I haven't heard that, so I am just wondering if you could clarify the department's stand on that.

Mr. Paul Fauteux: I would be happy to confirm what my colleague, Wendy Cornet, has said.

There is no agenda. There is no predetermined set of conclusions. There is no attempt to steer. There is a request for guidance.

Mr. Roger Valley: Thank you very much. That was the answer I wanted.

The Chair: Thank you to all of you.

We have actually managed to get all the witnesses and questions in on time. I thank all the members for their cooperation in keeping their questions as brief as possible so answers could be heard from the witnesses, and I thank you all for appearing before the committee this morning with your interventions.

Thank you. This meeting is adjourned.

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

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

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