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Chair

Ms. Nancy Karetak-Lindell

Standing Committee on Aboriginal Affairs and Northern Development

Thursday, April 14, 2005

● (1110)

[*English*]

The Vice-Chair (Mr. Jeremy Harrison (Desnethé—Missinippi—Churchill River, CPC)): I'd like to call the meeting to order.

Today, pursuant to Standing Order 108(2), we are studying on-reserve matrimonial real property.

Mr. Martin has a point of order.

Mr. Pat Martin (Winnipeg Centre, NDP): Mr. Chair, on February 21, 2005, I put forward a notice of motion that I wished to deal with the issue of residential schools. More to the point, I wished this committee to adopt the recommendations of the report of the Assembly of First Nations on the alternative dispute resolution plan. Two meetings ago I started the process of introducing that motion, and spoke to it for the duration of that meeting.

In this meeting today I would like to carry on with the introduction of my motion as the first order of business, and actually have it dealt with. Having checked with the clerk, I understand that since no vote was taken, this motion has not been properly dealt with one way or the other. It has to be either voted for or against.

Therefore, with the indulgence of the chair and my fellow committee members, I'd like to take the first five or ten minutes of this meeting and finally deal with the motion I put forward.

The Vice-Chair (Mr. Jeremy Harrison): I spoke to the chair, and I understand we'll need a motion to amend the agenda to deal with that motion first; otherwise we will deal with it at the end of the meeting. So, Mr. Martin, you'll have to move a motion to deal with that as the first order of business.

Mr. Pat Martin: With the permission of the chair, I would like to move that we change the agenda for today to deal with the notice of motion I put forward on February 21, 2005.

The Vice-Chair (Mr. Jeremy Harrison): I understand that this motion is not debatable, so we will go to a vote on it right now.

The vote is on Mr. Martin's motion to amend the agenda to deal with his motion that was previously debated.

(Motion agreed to)

The Vice-Chair (Mr. Jeremy Harrison): I have a copy of the motion, so we can proceed to debate on it.

Mr. Martin, you're the mover, so I guess you have first crack at it here.

Mr. Pat Martin: Thank you, Mr. Chair.

I will simply say, by way of introduction, I gave a full two-hour speech on this motion two meetings ago, and I think people have heard my points. I will simply restate that I think it's in the national interest that we finally put forward a plan to deal once and for all with some resolution to the injustice of the abuses that occurred in Indian residential schools. I believe the findings of our committee should at least be in keeping with the very thoughtful, thorough, and comprehensive report put forward by the Assembly of First Nations and the various NGOs that took part in putting that together.

Having said that, I would like to formally finish my introduction of the motion and move adoption of the motion, if that's in order.

● (1115)

The Vice-Chair (Mr. Jeremy Harrison): Mr. Cullen is next on the list.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chairman.

In the interest of time and because we have witnesses waiting, I'll be very brief.

I would like to propose a friendly amendment that deals with the summary paragraph. In other words, the preamble and the list of all the recommendations in the Assembly of First Nations report would stand. Then in lieu of the paragraph at the end of the motion before us, I propose that we say:

> That the committee adopt these recommendations as a report to the House. That the chair present the report to the House; and that the committee request that the government consider these recommendations in its ongoing discussions with the Assembly of First Nations and other partners.

The Vice-Chair (Mr. Jeremy Harrison): Mr. Martin, do you accept that as a friendly amendment?

Mr. Pat Martin: Yes, I do. I welcome that. I think it actually makes the motion better, and is more in keeping with what's happening as we speak with all the interested parties.

The Vice-Chair (Mr. Jeremy Harrison): Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary (Louis-Saint-Laurent, BQ): Mr. Chairman, I have to admit I'm completely shocked. The three opposition parties and the Liberal Party voted in committee, and today there's a second motion on the same topic. I don't understand how that can happen.

Can what has been done be undone in any old way and put back on the table, with no problem? I'm not familiar with this procedure. This all seems anti-democratic to me. We discuss major issues in a committee of the House, we vote on them, and now apparently anyone can come along and table another motion, and so on.

So it goes without saying that I'll be voting against the motion. I won't be voting against the substance of the motion, because in fact, the substance, in principle, is the same as what was proposed earlier, basically, except for a few corrections and a few points that were withdrawn.

When I made my speech in the House, I said that my personal intention was to make the corrections as quickly as possible, so that the matter would be completed. The three opposition parties managed to discuss this issue and settle it. At least, that's what I thought, but I see that we didn't settle anything. Obviously, there were some external pressures. One member of one of our three parties decided to back out and table his own motion.

I'd like to know if that's allowed. We need to know clearly...

● (1120)

[*English*]

The Vice-Chair (Mr. Jeremy Harrison): The clerk advises me that the motion is properly put and in order. The rules are that you can't vote on the exact same motion, but apparently this is different enough from what we previously voted on, debated, and passed in the House of Commons a couple of days ago that it will be in order for discussion here today.

[*Translation*]

Mr. Bernard Cleary: Now that you tell me it's okay, I don't intend to criticize or comment on your decision. However, I will definitely be voting against this motion. I hope that members of the committee on this side of the table will also vote against this motion. In fact, I hope people will understand that we're not voting against the substance of the motion, because it's basically the same, we're voting against this way of doing things.

I sincerely think that Mr. Martin should have a change of heart and try to find a way to solve this problem. I have to admit that from now on, it's going to be hard to present an organized opposition, knowing that the Liberal Party may be dealing behind the scenes to derail our decisions using methods that are, in my view, debatable.

I find it very sad that we've come to this. This is no way to respect democracy. Everyone has to live with their own conscience. I don't want to dwell on this. I really hope this motion doesn't carry.

Thank you.

[*English*]

The Vice-Chair (Mr. Jeremy Harrison): Mr. Epp, go ahead, please.

Mr. Ken Epp (Edmonton—Sherwood Park, CPC): Thank you.

I'm a new member on this committee, and I'd like to first of all ask a procedural question, and I say it in all sincerity. I really don't know.

The notice of motion was given on February 21, but now it has been amended. I'm just wondering whether it's appropriate for us to deal with this today without looking at the 24 or 48 hours of notice that's necessary with this amendment. It was a friendly amendment, but it is a substantial one, and we should consider that. I'd like you to answer that.

The Vice-Chair (Mr. Jeremy Harrison): I thank you very much for your submission, Mr. Epp. The amendment is properly put, in the opinion of the chair, and we'll actually be voting on the amendment prior to the vote on the main motion itself, so we'll have our say on that.

Mr. Ken Epp: So in other words, the rules for notice don't apply to amendments. Is that it?

The Vice-Chair (Mr. Jeremy Harrison): That's my understanding.

Mr. Ken Epp: I understand that. I thought I'd try that. I would like then to say a little bit more about this. I feel that moving forward with this particular motion at this time sort of goes, from what I understand, somewhat against the intent of what has already been done by the previous report and what was submitted in the House.

I would like to submit that the amendment that has been put forward by Mr. Martin is an open-ended one that gives the government years and years and years again to consider it, because it doesn't say that the government must respond according to the standing order, which means that it will just simply put that into the hopper and keep on having the discussions endlessly. I think in that sense, this particular amendment is maybe not quite as good as what it should be. I think the committee should seriously consider the impact and the unintended consequences of adopting that amendment.

I'm speaking specifically to the amendment right now, since that's what's in front of us. From my understanding of this whole situation, and not being involved from day to day on this committee, which I often wish I were, I'm not as up to speed on it as I should be. But it seems to me there should be some sense of urgency in resolving this issue. This particular amendment I think prolongs it, and I feel that it's an error to do that.

I'd like to have other committee members respond to that particular concern and try to tell me that I'm not right, if that's the case, but that's my understanding, sincerely.

● (1125)

The Vice-Chair (Mr. Jeremy Harrison): Mr. St. Amand was next on the list.

Mr. Lloyd St. Amand (Brant, Lib.): Just very briefly, Mr. Chair, I want to remind Mr. Cleary across the floor that this is a motion by Mr. Martin. There are some slights even in this game which cannot and should not be ignored, so I take offence personally and on behalf of my colleagues at the suggestion from Mr. Cleary that we have, on this side of the floor, cooked up something in a back room. That is offensive. It's just absolutely untrue, and frankly it's unparliamentary.

The Vice-Chair (Mr. Jeremy Harrison): Ms. Skelton, go ahead, please.

Mrs. Carol Skelton (Saskatoon—Rosetown—Biggar, CPC): Mr. Chair, if we're going to vote on the amendment of Mr. Martin's original motion, I would like to have the wording in front of me so I can see exactly what it is or what we're voting on—the amendments and the original motion—and I don't have that courtesy. I would like to see that. Thank you.

The Vice-Chair (Mr. Jeremy Harrison): I think that's a very valid point.

Do all members of the committee have the motion in front of them right now?

A voice: We have only one copy and we have it only in English.

The Vice-Chair (Mr. Jeremy Harrison): We have only one copy of the motion and we have it only in English. Quite frankly, I think that's a problem.

Mr. Valley, would you like to say something?

Mr. Roger Valley (Kenora, Lib.): I'd just like to ask the clerk something. When we have friendly amendments, it's not normal practice to put them in writing in front of members, is it?

The Vice-Chair (Mr. Jeremy Harrison): Well, Mr. Valley, I think the point is that members of the committee don't have the motion in front of them right now, not to mention the amendment, and there's only one copy of the motion and it's in English. I think that's a serious problem. We need to get some copies of the motion out to members of the committee.

Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: Could we have the French version of what Mr. Martin tabled this morning?

[*English*]

Hon. Sue Barnes (London West, Lib.): I have a a point of order, Mr. Harrison. Perhaps in courtesy to our witnesses, while we get that done we could hear testimony for just for a couple of minutes, so we don't waste this whole meeting. We have witnesses before us. I think that's in order, and you can quickly get photocopies made across the hall.

Thank you.

The Vice-Chair (Mr. Jeremy Harrison): Do we have the consent of the committee to hear witnesses in the interim while we have the motion distributed?

Hon. Sue Barnes: I just want to clarify, Mr. Harrison: maybe we could just hear their testimony and not have the questioning, and then we'll be getting back into this.

Thank you.

The Vice-Chair (Mr. Jeremy Harrison): Mr. Trost.

Mr. Bradley Trost (Saskatoon—Humboldt, CPC): If I may comment on that, it seems to me that if we begin to call witnesses and move them in and out, we should let the witnesses finish and then question them. From having worked on all the committees I have, I know that we will end up hearing a gentleman present an absolutely outstanding point and begin to go through and think about what they are saying, getting into the flow of this thing, and begin to move back and forth. As a committee, things need to be done systematically, properly, and in order.

Now, Mr. Martin's original resolution and the amendments are all important and have value and are very much part of this committee's business, but let's be pretty clear here: if the witnesses came today, as the time's been booked for them, and we're going to start into what they're talking about, let's go ahead and let them make their full presentation. We should then go into proper questioning in a proper way, and then we can deal with Mr. Martin's motion at the end of the committee.

My point is, let's do everything in decency and in order and go from there.

● (1130)

The Vice-Chair (Mr. Jeremy Harrison): Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: It's more or less along the same lines as what was just said. Normally, we're supposed to have it in French. So we will wait until we have it in French before discussing it.

I find it sad to have to tell people to wait, but we're not the ones who tabled this motion. It was tabled by the other parties, but we want to discuss it seriously, with all of the tools we need to do our job properly.

So, unfortunately, I can't agree with this, not because of the parties or the people here, but because of the way this matter was handled. Everyone knows that Parliament is bilingual and that the material addressed to committees has to be bilingual too. We have discussed this—you will recall—at the committee table and we concluded that the documents had to be in French. We were supposed to have them, so someone should get them to us. We are waiting for them. I am willing to wait a good part of the day. Someone should get them translated. What do you want me to say? I can't discuss this issue without having the right copy in French. Unfortunately, I'm not bilingual enough to work in the way that's being proposed.

[*English*]

Hon. Sue Barnes: On a point of order, Mr. Harrison, I would just like to remind the three parties opposite that it was they who put this motion on the order paper the other day when we went for two hours. It was the Conservatives, the Bloc, and the NDP—

The Vice-Chair (Mr. Jeremy Harrison): I don't think this is debate, Ms. Barnes.

Hon. Sue Barnes: I just want to state the fact that they're now objecting to what they've already done.

The Vice-Chair (Mr. Jeremy Harrison): Well, that's debate.

Mr. Bellavance, do you have a short point?

[*Translation*]

Mr. André Bellavance (Richmond—Arthabaska, BQ): I think we shouldn't let people get away with saying whatever they want. The motion we are discussing now was tabled by Mr. Martin, not by the three parties. As for the other motion, which was tabled in the House of Commons, the three opposition parties had come to an understanding. So we are not talking about the same thing, Ms. Barnes. So tell it like it is.

[*English*]

The Vice-Chair (Mr. Jeremy Harrison): Well, I think we have agreement here that we're going to hear testimony, at least until we have the bilingual translations for all committee members.

We shall start with Mr. Larry Chartrand, who is the director of the aboriginal governance program at the University of Winnipeg.

Thank you very much for coming, Mr. Chartrand, and we look forward to your presentation.

Mr. Larry Chartrand (Director, Aboriginal Governance Program, University of Winnipeg): Thank you very much, Mr. Chairman and members of the committee. It's a pleasure to be here.

I apologize for not being able to get a written submission to the committee in advance. Also, I'd like to make a note that what I say here is not as a representative of the Indigenous Bar Association. I did a similar presentation before the Senate committee on behalf of the Indigenous Bar Association, and I represented their views. Today I'll be making an independent, academic assessment of the issue. There is some overlap, but there is some difference as well.

The topic of my discussion is called “Understanding Matrimonial Property Issues in a Decolonization Context: In Search of a Soft Bed to Lie On”.

How can we, as aboriginal and non-aboriginal peoples, find this soft bed? I can't provide a soft bed or build it, but perhaps I can offer some guidance on how the committee may be able to at least find a softer bed to lie on.

Before I do that, I want to point out what I've identified in some of the discussion to date and in the Senate report as an inappropriate underlying assumption about aboriginal peoples and their political and governance capacity. It is something that seems to constantly creep into the dialogue and the discussion on this issue. Then I will point out some possible options, one in particular, that the committee might think about—how to balance the legitimate interests of aboriginal self-government with the interests of spouses, whose equality rights may require protection during the dissolution of couplehood.

I want to start off with the notion of the vacuum myth. Canadians are stuck in what I call a colonial movement memory. I have to go back to childhood education here. Movement memory, as a concept, refers to our ability as humans to move in certain ways without having to consciously think about it. For example, we have learned to walk, placing one foot in front of the other foot without having to consciously say, “Okay, one foot, next foot", etc.

Of course, that was not always the case. When we are about 18 months old, we actually had to learn how to walk, and to consciously think about it. Most of us can't remember those challenging moments. But the same is true of some of the assumptions that Canadians hold of aboriginal peoples. These assumptions are so ingrained that they are not consciously thought about. Unfortunately, Canadians and the Canadian government have been under the wrong assumptions for a long time and have adopted inappropriate colonial movement memory.

There's one particularly destructive underlying assumption that I have noticed in the reports and in the previous testimony and comments by the committee on this study. I'll just cite one reference in the Senate report. In the introduction, on page 14, they say:

> Presently, when their marriage or common law relationship breaks up, women on reserves do not enjoy thesame rights as other women in Canada. They are left without any protection because the Indian Act is silent on this issue, provincial laws cannot apply to the division of real property, and there is no other legislation to fill the gap.

Mr. Jim Prentice, in his remarks to Wendy Cornet earlier in this committee study, also made a similar remark, where he stated:

> Otherwise, some aboriginal women and children and non-aboriginal women and children will be in a position, presumably for the next 50 to 100 years, where they have no rights, which is surely an unacceptable outcome.

● (1135)

What is the underlying assumption? What is the colonial movement memory that those statements present? It's a myth embedded in these statements that aboriginal peoples are lawless peoples without the intervention of the Canadian state. It implies that without a self-government agreement in place, or the intervention of Canadian law, aboriginal women are at the mercy of a lawless and chaotic state. Of course that's ludicrous. That's not the case.

Aboriginal peoples have had their own legal systems from time immemorial. This is a colonial assumption that violates some of the most basic human rights we have, the right of peoples to govern themselves without the racist notion that because they are aboriginals, they must be perceived to be uncivilized and lawless.

This committee needs to dispel that colonial myth, that movement memory, and walk a different path. Aboriginal peoples have their own laws, customs, and processes that they can rely on in such matters. In fact, the Senate report briefly highlights some of the known situations where aboriginal communities and bands have actually developed their own means of dealing with matrimonial property issues. Yet they still include statements that have these underlying colonial assumptions built into them.

At the same time, this committee must also be cognizant of the fact that colonization has had a detrimental impact on aboriginal communities and their self-confidence, resources, and capacities to effectively govern. And that, of course, cannot be ignored.

I'd like to now suggest one path or one possible solution to balance what seems to be the crux of the issue here, the difference between the collective aboriginal rights and the rights of individuals and women on reserve.

One solution may be to develop a matrimonial property code—it could be called the “model band bylaw” under the Indian Act, but it doesn't really matter if it's under the Indian Act—similar to the Senate report. But it would be presumed that this code would apply to all bands unless the bands had established their own matrimonial property regimes, and in that case they would be exempt from the provisions of the code. Subsequent bands could then opt out once they had established their own systems.

It's kind of like the reverse of the First Nations Land Management Act, where the bands have to opt in to get under a new regime. In this case, the regime would be imposed, and then bands could opt out, or if they already had a system, they'd be exempt.

Where a band, acting under the Indian Act, establishes its own matrimonial property regime—actually acting under the Indian Act—a condition that it must comply with minimum international human rights norms should be imposed. This would not pose a threat to self-government, because the band, by establishing a regime under the Indian Act, would be acting under delegated federal authority anyway. It's a little more complicated, of course, if it's under its inherent authority, which I'll get at in a minute.

It should be noted that this condition that bands comply with international human rights standards is different from the Senate committee's recommendation that "...First Nations may adopt their own rules, as long as they meet minimum standards such as those of current provincial and territorial legislation."

I would recommend, contrary to that, that the measurement, the minimum standard, be made against international human rights standards as opposed to provincial standards, which vary across the country, and which themselves may not necessarily meet the minimum international human rights standards.

Secondly, using the international standards as a condition of self-government in this field is more appropriate when the first nation is establishing matrimonial property regimes under its own inherent authority. It is still a violation of the principle of self-government to impose any condition when an aboriginal government is exercising its legitimate jurisdiction. However, interference with a first nation self-government authority may be justified—and I use the term justified in a broad moral sense—when Canada is under an international obligation to ensure that certain minimum human rights are upheld, but only until such time as first nations become independently responsible for compliance with international human rights norms.

We should note that it has become accepted international practice to demand of peoples seeking independent nationhood status at the international level to insist on compliance with fundamental international human rights norms before the international community is willing to acknowledge their status as independent states. Of course, the example of that is the new nations under the former Yugoslavia.

● (1140)

In this case, Canada is not interfering in aboriginal sovereignty because it can; it is interfering in aboriginal sovereignty because it must, in order to uphold fundamental human rights that transcend sovereign boundaries. Maybe due to the unique colonial context of Canada, this allows Canada to have the ability to enforce compliance, an ability not normally available to states at the international level against each other. Such action may still be wrong, if we did that, because Canada ought not to have had the ability to impose conditions on the sovereignty of first nations in the first place, but the reality is that, ironically, Canada does at the moment have the ability to impose such a condition. Canada at least has the moral ground to argue that it is consciously compromising aboriginal rights in the name of human rights and not blindly going through a colonial movement memory.

That's the main thrust of my argument, but I do have kind of a footnote that is totally unrelated to what I just talked about that might be another alternative worth thinking about.

As a result of the unique land ownership and land management regime on reserves, housing may very well be better classified as chattel than as real property; hence one would be exempt from the limitations imposed by the Derrickson case on real property on reserve, because housing, under this unique context, would be personal property.

I just thought about that this morning. I haven't put any detail to it, but it may be something worth thinking about or studying further, whether that is or is not possible, to characterize aboriginal housing as personal property because of the unique land regime, the fact that the Crown has the ownership, and allotments are actually legislative forms of property and not common-law forms of property.

Those are my opening comments. I'll end there.

● (1145)

The Vice-Chair (Mr. Jeremy Harrison): Thank you very much, Mr. Chartrand.

We'll now go to Kent McNeil, who is a professor at Osgoode Hall Law School.

Thank you very much for being here, Mr. McNeil, and sitting through the first half hour of fun. We look forward to your comments.

Mr. Kent McNeil (Professor, Osgoode Hall Law School, York University): Thank you very much, Mr. Chair, and thank you to the members of the committee for inviting me to come and speak to you today.

I'm going to be quite brief. My opening remarks are really just going to set out my understanding of the legal and constitutional position. Then I'd very much like to hear questions from members of the committee. Hopefully, I can address, or attempt to address, some of the concerns. And forgive me if I'm just repeating things that everyone is quite familiar with.

The constitutional situation is well known. The provinces have authority over property and civil rights in the provinces, and through that constitutional authority they've enacted matrimonial property legislation. On the other hand, Parliament and the federal government have exclusive jurisdiction over Indians and lands reserved for Indians. Of course, lands reserved for Indians include Indian reserves. The result of this is that provincial matrimonial property laws, while they apply to Indians in a general way—that's status Indians under the Indian Act—in the same way they apply to other people in Canada, they do not apply to lands on reserves, because that's exclusive federal jurisdiction.

That's what the Supreme Court held in the Derrickson v. Derrickson case in 1986. We've been living with this situation for twenty years in accordance with the Supreme Court decision, but of course that was the situation prior to that decision as well.

There was a possibility argued in that case that section 88 of the Indian Act would take effect and make provincial matrimonial property laws apply on reserves to reserve lands. The Supreme Court dealt with that as well, and they decided no, that is not the effect of section 88. For one thing, it's unclear whether section 88 actually makes provincial laws apply to lands reserved for the Indians. Section 88 just generally makes provincial laws of general application apply to Indians within the province, and then there are a number of exceptions. But it doesn't mention application of provincial laws to lands reserved for the Indians. So there's an ongoing dispute there, a legal and constitutional dispute, about whether provincial laws in relation to lands can be referentially incorporated by section 88 and basically turned into federal law.

In the Derrickson case, the Supreme Court said be that as it may—and they weren't going to decide that issue—there was a direct conflict between the Indian Act provisions in relation to possession and use of land and the provisions in provincial matrimonial legislation dealing with those same matters. They were dealing with the British Columbia Family Relations Act, but it would be a similar situation in other provinces, subject to variations in the provincial legislation.

That's the legal and constitutional position. Parliament has the exclusive jurisdiction. Parliament has not enacted any law in relation to division of matrimonial property on reserves. When marriages break down, provincial laws don't apply of their own force, and they aren't referentially incorporated by section 88.

As a result of this, there is a legislative vacuum. I appreciate the remarks that Professor Chartrand has made that this does not mean there's necessarily a legal vacuum, because aboriginal peoples, first nations themselves, may well have customs and laws dealing with these matters, and one really needs to take that reality into account.

In the Derrickson case, though, the Supreme Court basically decided that there is, from the point of view of Canadian constitutional law and the Canadian legal system, a vacuum here. They basically threw it back to Parliament and said they recognized the problem, they recognized the fact that this may be unfair to spouses. In fact, it's usually women who suffer, because when certificates of possession are issued for lands on reserves, they're often in the man's name, and that means the woman in the marriage, in the relationship, is unable to get possession or a half interest in those lands if the marriage breaks down. So the Supreme Court recognized this, but they basically said they couldn't do anything about it.

I think constitutionally the Supreme Court was right in relation to that matter. Of course, the question becomes, what is the solution here? For me, it really raises political issues more than legal issues. I think the legal and constitutional position is quite clear. But the problem, of course, with Parliament just stepping into the breach and amending the Indian Act or enacting free-standing legislation dealing with division of matrimonial property on reserves is that any amendments or changes to the Indian Act or to the legal regime on reserves tend to create opposition from first nations, and not necessarily because they're opposed to the substance of the changes.

I think it would be wrong to interpret opposition by first nations to parliamentary action to deal with this problem as meaning that those first nations or individuals who are opposing it are necessarily opposed to equitable division of matrimonial property. I think the matter is much more complex than that. It's really an issue of self-government. The Indian Act itself, I think, is seen as a colonial piece of legislation that has been in place for around 130 years, yet it's very difficult to know how to deal with that because it's become ingrained, it's part of the system, it's what people live with. But any changes to it are regarded as further colonialism and an interference with first nations' inherent right of self-government.

The issue is how does one deal with this problem of matrimonial property on reserves and at the same time respect the inherent right of self-government of aboriginal peoples in general and first nations in particular? That's what I see as the problem. The issue that has to be dealt with is the conflict here between the Indian Act and Parliament's legislative authority on the one hand, and the inherent right of self-government on the other.

The federal government, since 1995, has had an inherent-right policy whereby it recognizes the inherent right of self-government and negotiates modern land claims agreements and self-government agreements on that basis.

That's all I want to say in terms of opening remarks. I'd be very happy to attempt to answer questions from the committee members.

● (1150)

The Vice-Chair (Mr. Jeremy Harrison): We are going to go to questions. These witnesses came a long way to be here, and they're going to have their hour.

We will go first to the Conservative Party and Ms. Skelton for her nine minutes.

Mrs. Carol Skelton: I just wanted to thank you very much for coming today. I really appreciate it.

We heard the other day from the Native Women's Association of Canada, and they told their stories. I come from an inner-city area, and I see a lot of women and children in poverty who have come from the reserves and are living below the poverty level. It's extremely difficult—and that's in Saskatoon—Rosetown—Biggar, so I have the core area. They said that we need some kind of legislation now that will give them some rights.

What is your feeling on that? Can both of you tell me about that?

Mr. Larry Chartrand: Thanks for your question.

I agree. I think we need to enact legislation, and we need to do it immediately. There's just too much injustice occurring.

As you say, a lot of the aboriginal women who have to leave the reserves because of their inability to stay there for whatever reason do run into problems once they get to the city. I'm living in Winnipeg now, so I know exactly what you're talking about. This has to be done. I totally agree with the National Women's Association of Canada on that point.

I also think, though, that we've got to recognize the self-governing authority of aboriginal communities so that if they choose to enact their own regimes, they will be opted out of any legislation and their own regimes will prevail—on the condition, of course, that they meet the minimum international human rights standards of matrimonial property devolution governing the breakup of a marriage.

● (1155)

Mr. Kent McNeil: To add to that, I think a simple imposition by Parliament of a legislative regime isn't going to work. It's going to cause a lot of opposition. I'm sure people are familiar with what happened to the First Nations Governance Act a couple of years ago and the opposition to it.

Once again, I'd like to emphasize that I don't think the opposition necessarily comes from the substance of legislation. I don't think first nations, for example, were necessarily opposed to more accountability and so on in relation to their governments; but opposition arises over who is actually imposing it and where it is coming from.

If it's coming from an acceptance by first nations of it as a desirable thing, and if they've got input and feel they've been part of the process, that they've had some choice, and it's not just something once again imposed by Parliament, then I think there's much more chance of acceptance and success.

Yes, legislation is probably going to be necessary, but I really think it has to be done in consultation with first nations and in such a way that they feel this is something they are doing as well as Parliament.

Mrs. Carol Skelton: From the testimony the other day I could sense their frustration that the legislation wasn't being put in place by either the band councils or Parliament. There is a huge gap there that the women and children are falling through and they are not being helped.

Can you see this? How soon could we get legislation, or how soon are the band councils going to act on this? Maybe that was why Mr. Prentice mentioned 50 years. I have no idea.

Mr. Larry Chartrand: I agree with Kent in terms of how the legislation ought to be developed. It almost inevitably nowadays has to be done in consultation with the aboriginal groups affected, often the AFN and the Congress of Aboriginal Peoples. It's come to that day and age when Parliament can't unilaterally make legislation that affects aboriginal people any more. It just can't; it's not lawful any more, let alone constitutional.

So it has to be done in conjunction with aboriginal peoples, no doubt about it, but it's got to be given priority, and we need to find ways to get that as a priority item.

Mr. Kent McNeil: Perhaps I could just pick up on a point that Professor Chartrand made. I think he said that it wouldn't be lawful for Canada to unilaterally enact legislation, and that is part of the problem with the Indian Act itself and with any changes to it, or any legislation directly in regard to first nations or other aboriginal peoples in Canada.

We now have constitutional protection for existing aboriginal and treaty rights, and existing aboriginal and treaty rights probably include the inherent right of self-government, and the Canadian government has accepted that position. What that means is the Indian Act itself and the band council provisions in the Indian Act may in fact be in conflict with the inherent right of self-government, so any changes to that or more imposition of a Canadian legal regime on reserves or in respect to first nations may well violate their inherent rights.

I think Professor Chartrand is correct that there's a legal problem as well as a political problem. I was talking more about the political problem before.

That is one more reason that first nations have to be involved and there has to be their participation, so they feel they are in fact exercising their inherent rights in regard to this matter and not just having it imposed on them again by the Canadian Parliament.

● (1200)

Mrs. Carol Skelton: The Native Women's Association of Canada say they are writing their own legislation and then they are going to bring that forward for discussion because they feel that we are letting them down.

Professor Chartrand, you talk about provincial standards. Which are the worst provinces in this country for provincial standards? You talk about provincial standards on housing and so on. Do you have that? I'm assuming you have researched that.

Mr. Larry Chartrand: I was just referring to what was stated in the Senate report. They mentioned that some of the provinces didn't have the same standards as other provinces, particularly with the same-sex and common-law inclusion.

Mrs. Carol Skelton: You haven't done any studies on that?

Mr. Larry Chartrand: I don't know which provinces are the offenders, or not. Probably Alberta.

The Vice-Chair (Mr. Jeremy Harrison): You have about a minute left.

Mrs. Carol Skelton: I want you to expound a bit more, Professor Chartrand, on your point that housing should be reclassified. That's a very interesting point, and you said it just popped into your head this morning. Do you have any more that you would like to say about that? I think that is very interesting.

Mr. Larry Chartrand: Maybe Kent can help me out with some additional points.

I'm not a property law professor or expert, by any stretch of the imagination, but there is the idea that because reserves have a unique property system and the individual landholdings on reserves are not common-law-based but legislative-based, or based on custom law of the aboriginal community, that houses on those lands may not have the same characterization as real property that would normally be understood outside a reserve property in a common-law system. They may be more akin to being chattel or personal property, often because the band in many cases actually owns the allotment, and the individuals are working toward owning the houses, or they own the houses as their personal property, separate and apart from the allotment.

There may be some possibility to rethink what the Supreme Court of Canada just seemed to assume was the case, that the house was real property, but it may not indeed be the case.

Mrs. Carol Skelton: That's very interesting. Thank you very much. I appreciate that.

The Vice-Chair (Mr. Jeremy Harrison): We now move on to Mr. Cleary, for the Bloc, for seven minutes.

[*Translation*]

Mr. Bernard Cleary: Thank you, Mr. Chairman.

First of all, thank you both for attending this meeting to discuss a topic that is of crucial importance to us on our reserves. Obviously, the solution is not simple, because behind this whole question, there are a number of important points for aboriginal people and their aboriginal rights. The whole issue of land is going to keep causing some problems, if only because currently, the land doesn't even belong to the Indians. The lands belong to Her Majesty the Queen, and we can't used them to do as we see fit. That is a problem in and of itself.

In my opinion, like Mr. McNeil said, this problem can be resolved by the inherent right to self-government. Of course, the government recognizes the inherent right to self-government, but basically, it doesn't recognize anything. It seems to me that the term “inherent” should speak for itself: it's something that belongs to you in your own right, which means that you get to decide what your own rights are. The fact that they want us to believe they recognize the inherent right and at the same time they want to negotiate it seems to me hard to swallow. Aboriginal groups also have a lot of trouble with that.

The fact remains, however, that the solution as you described it earlier is there. Aboriginal groups will have to establish their own rules in this connection. They will surely have to base those rules on something, but they will have to establish their own rules. The only way to get there is through a government that can enact legislation and impose rules.

Given that it's not going to happen overnight that all of the reserves or all of the communities will have a self-government agreement or inherent right agreement, you can well imagine that we're not out of the woods yet when it comes to this issue. I'd like to hear what you think about this, because we can't wait, in my opinion, for all of that to be resolved. If we wait to solve the problem of divorced women and to do them justice, we won't get there.

That's a problem. Experts like you can probably help us to find solutions or at least give us some good suggestions. Having dealt with this issue fairly often—I am aboriginal myself—and spent 25 years negotiating and 40 years working on all kinds of First Nations files, I find that this matter has been discussed for a very long time. And yet no real solution has ever been found. Why? Because we don't have the power to find real solutions. We will find them when we have the power to make our own laws and the power to set up our own government or exercise our inherent right of self-government.

So I would like you to answer my questions. I understand that I'm asking you for a thesis, but I'd like you at least to give us a few useful suggestions. By the way, we've heard some useful suggestions, but they always lead more or less to the establishment of their laws, their rules, etc. It has to be done somehow.

● (1205)

Some aboriginal women gave us some interesting suggestions, in my opinion. They talked about a kind of law that would be temporary, that would solve a certain number of problems and that in my view, would become a fantastic laboratory. But there too, it takes money. It's always the same thing. We always come back to the same thing: it takes money.

Eventually, these people—I'm thinking of aboriginal women—who really want to do something are going to need the means to do so.

I'd like to hear from you on this, and especially what you suggest as possible solutions.

[*English*]

Mr. Kent McNeil: I think there's an issue....

● (1210)

[*Translation*]

Sorry to have to answer in English, but I don't have a good enough command of French to be able to answer in French.

[*English*]

I think there's an issue here with respect to first nations autonomy, their inherent right to self-government, and what standards they have to respect. In this context one can say that on the one hand this is a matter for first nations to deal with because it's part of their inherent right to self-government, and the Canadian state and Parliament shouldn't be interfering. But what if they don't do it? When they do it, what if they don't do it in a way that Canadians generally think is in keeping with the standard of gender equality we now have as part of our society generally, as part of our charter?

It's also important that subsection 35(4) also states that the rights that are recognized and affirmed in section 35 are recognized and affirmed equally for female and male persons. So we actually have gender equality in the constitutional provision that recognizes and affirms aboriginal and treaty rights.

Now, there are questions here about how that relates to the inherent right to self-government, and whether that's the standard by which the exercise of that inherent right could be evaluated. Professor Chartrand's suggestion is that international standards should be looked at as well. So one could look at that, not only in relation to what Canada does, but what first nations are willing to do. If what they are willing to do in this regard doesn't meet international standards, that might well give Canada justification for intervening.

The Vice-Chair (Mr. Jeremy Harrison): We'll move on now to Mr. Martin for seven minutes.

Mr. Pat Martin: Thank you, Mr. Chair.

Thank you, witnesses, and welcome.

The deeper we get into this subject the more we realize how enormously complex it is. We know that the Senate has just undertaken a comprehensive 18-month study. I don't know if either of you was a witness there, but certainly a great number of witnesses were heard. We're essentially doing the exact same thing here, calling the same witnesses, doing the same thing, and spending an enormous amount of time on it.

Subsection 35(4) has the equality provisions, but section 35 itself doesn't really define aboriginal and treaty rights to any full extent. A commitment was made years ago that some day we would finally sit down and agree on what aboriginal and treaty rights mean, what they extend to, and address some of those issues. That doesn't seem to be on the agenda any time soon.

I'm finding it difficult to frame the questions I want to ask you. Everything you've said is true and I agree with everything you've said, but it hasn't really taken us any closer to any kind of resolve or recommendation. There's this Eurocentric notion, where I come from, that private ownership will solve everything; that part of the problem is the nature of collectivism and cooperative ownership, and that shared ownership is somehow a quaint thing of the past that has to be stamped out. But culture, tradition, and heritage run far deeper than our Eurocentric notion of private ownership as the be-all and end-all.

I'm very aware of the culture and traditions we're stomping on if we recommend as the default position that if you don't comply with our vision of how you should conduct yourselves, within 12 months you will get our vision of how we conduct ourselves imposed on you. That's essentially the First Nations Land Management Act: within 12 months you must do exactly what we want you to do, or we'll make you do exactly what we want you to do. How does that jibe with the inherent right to self-government?

It drives me nuts trying to think about it, really. But I represent the core area of Winnipeg, where 16,000 people self-identify as aboriginal, and there are probably many more who are off the charts. A great number of those are displaced persons who essentially have no place for themselves in their home communities or the first nations they came from, sometimes due to marital break-up.

I don't even know if I have a question, other than the comment that everything you said is true and I appreciate your sharing it with us. But I don't feel any further ahead than when I started today, other than the sort of Ayn Rand vision of the world that all things collective are bad and all things private are good, which is what I hear sometimes from my colleagues down the way here. That's a simplistic notion that is not sensitive to culture, tradition, and heritage, so I don't see any solution there.

I lived in the Yukon for eight years, and I always heard the redneck view that the reason houses are beat up on Indian reserves is because they don't own them so they don't take care of them. It had nothing to do with chronic abject poverty, and badly constructed homes on permafrost, with heated crawl spaces—which should tell you how Indian Affairs is sensitive to housing.

I don't have any questions.

● (1215)

The Vice-Chair (Mr. Jeremy Harrison): If our witnesses would like to comment on anything Mr. Martin has said, there's additional time left.

Okay, we shall go to the government and Mr. St. Amand.

Mr. Lloyd St. Amand: Thank you, Mr. Chair.

Mr. Martin has said that he agrees with much of what you've indicated, or with all of what you've testified to or stated. I can't go that far, Mr. Chartrand—and I don't want to clash with you—without diluting your opening comments.

If I may speak about a member of the Conservative Party, Mr. Prentice has great respect for aboriginal peoples. I know he does. We all do. And I dare say those members of the Senate committee have that same deep respect for aboriginal peoples.

So with the greatest respect, for you to take two snippets of transcript and conclude that Mr. Prentice or the Senate or we by any means consider aboriginal communities to be lawless societies is simply untrue. That is not the conclusion Mr. Prentice has drawn. It's not the conclusion we have drawn. All we are doing is identifying a legislative gap, responding to an identified need. We're not, in doing that, by any means thinking that aboriginal societies are lawless.

That's just to clear up any misconception you may have, and to tell you politely that if you have that perception, you're wrong.

I note in your biography, Professor Chartrand, that the Indigenous Bar Association itself has concluded that the Indian Act should be amended to include a provision for a spouse to receive or to be awarded exclusive possession of the marital home. That is, I take it, the position of the Indigenous Bar Association.

Mr. Larry Chartrand: Actually, I don't have their submission before me, and I can't quite remember exactly that point. But I'm actually not representing them here, in any event.

Mr. Lloyd St. Amand: I know you're not, but you are the past president of that association, correct?

Mr. Larry Chartrand: Yes.

Mr. Lloyd St. Amand: And I presume you are, as a result, familiar with their views of this long-standing problem and their recommendations to address this long-standing problem.

It's my understanding that the Indigenous Bar Association is saying that the Indian Act should be amended, that specifically tailored legislation to address this legislative gap should be passed. Am I correct?

● (1220)

Mr. Larry Chartrand: I think that's the general gist of their recommendations, but they also are cognizant of the fact that it can't be done unilaterally, either. It has to be done in consultation with the respective aboriginal groups that are affected. I'd have to double-check to make sure, but I'm pretty sure that is an important aspect of their recommendation.

On the point about assuming that the Senate committee and Jim Prentice are colonialists, that wasn't my intention. I just wanted to point out the fact that oftentimes statements are made that ignore the fact that aboriginal peoples have their own form of governance, their own system of laws and customs to guide decision-making. Oftentimes that's ignored. I mean, the Senate report, inconsistent with that assumption, goes on and identifies some communities that actually do that.

But it's a common, often unconscious, articulation of aboriginal-Canadian relations that without Canadian law they are in a lawless vacuum. The Supreme Court of Canada itself said that in the Nikal case.

Mr. Lloyd St. Amand: We all agree, yourselves included, if I may speak for Mr. McNeil, that there is a legislative gap; that there are specific examples of spouses, typically women, who are left without a remedy; and that something should immediately be done to address that gap and to meet that need. Am I correct?

Mr. Larry Chartrand: Yes, but it need not be legislation. It may be the aboriginal community's own efforts to do that.

Mr. Lloyd St. Amand: Fair enough. I have two questions. First, then why hasn't it already been done by aboriginal communities? Second, how much longer should we wait?

Mr. Larry Chartrand: On the first question, it would require a long time to explain the impact of colonization on the ability of aboriginal communities to govern themselves—with respect to resources, capacity, and self-confidence. We'd have to look at the history of the residential schools, the Indian Act, and the pass permit system. We'd have to look at all that. At the end of the day, we'd say, "No wonder these communities are oftentimes in the conditions they are in".

Then we'd ask ourselves, "What do we do now? How can we help the aboriginal communities help themselves?" Imposing more legislation unilaterally doesn't help. That's colonial. What we can do is increase the capacity of aboriginal communities to develop their own systems of laws, their own governance. Some of this could be done through training—for example, leadership training of band councillors and people. We need to talk about principles of good governance from an aboriginal perspective and enhance that knowledge base of how to conduct good governance. If we put more time and energy into this kind of effort, we wouldn't even have these questions here today. It would be moot.

The Vice-Chair (Mr. Jeremy Harrison): Thank you, Mr. St. Amand.

We have about 12 minutes left in our witnesses' testimony, and we'll go to a second round. We're going to have to limit the questions to four minutes, as opposed to our regular five minutes.

We will go to Ms. Skelton from the Conservative Party.

Hon. Sue Barnes: On a point of order, I thought this was supposed to be from 11 to 12. We have another person who is supposed to be here from 12 until 1, and my watch says we're at 12:20.

● (1225)

The Vice-Chair (Mr. Jeremy Harrison): Madam Barnes, as you are quite aware, we didn't actually start hearing these witnesses until 11:33, exactly, and we have them scheduled for an hour. We will go to 12:33 and they will have their full hour. They have come a long way to be here.

Ms. Skelton.

Hon. Sue Barnes: Will our next witness have her full hour also, Mr. Chair?

The Vice-Chair (Mr. Jeremy Harrison): We'll discuss that as soon as these witnesses have finished their testimony. The committee can decide how we should proceed.

Mrs. Carol Skelton: I would like to thank Mr. St. Amand for the comments he made about Mr. Prentice. Everyone at this table is very conscious of what's happening in our communities. I want you to know that I am not a redneck sitting at this table. Neither are my colleagues. Every day in the city of Saskatoon our office deals with people in distress. We are very sincere in everything that we're doing, and the Native Women's Association of Canada made that point the other day when they were here. They said we needed something done immediately. In fact, they're doing their own legislation to fill the gaps.

When Danalyn MacKinnon appeared before the committee in 2005, on April 7, she stated that we needed an immediate mechanism for emergency relief. Do you have any recommendations on how such a remedy could be put in place for individuals on reserve, both women and men?

Mr. Kent McNeil: I don't think I have a specific recommendation for that, but I can say that part of the problem with first nations exercising their own authority to resolve this problem—which I think we all accept is a very important and pressing one that has to be dealt with—is it's not clear that band councils under the Indian Act, for example, have the authority to create matrimonial property regimes because their authority—what they can do—is set out quite clearly in the Indian Act, and that's the extent of the delegated authority they receive from Parliament.

There is also the issue of the inherent right, which doesn't depend on delegation from Parliament. So can they act on their inherent right in order to resolve this problem? It's not clear that band councils can exercise the inherent right. Where does that inherent right actually reside? The Royal Commission on Aboriginal Peoples said it resides in aboriginal nations, not in local communities.

There are real issues here about how first nations themselves can deal with it, so it's not just a question of first nations being unwilling to deal with or ignoring the issue. There are legal issues about their capacity to do so.

So I think that there has to be some kind of regime that would involve acknowledgement by Parliament of the capacity of first nations to deal with it, and maybe legislation could be created so that would happen. But that would have to be something that would be done in consultation with first nations and not be imposed on them. I think that's really vital.

I agree entirely with you that this is a pressing problem that has to be dealt with, but how it is dealt with is really quite complex. There's no easy answer or solution.

The Vice-Chair (Mr. Jeremy Harrison): We'll go to the government now and to Mr. Valley.

Mr. Roger Valley: Thank you, Mr. Chair, and I'll be quite quick, because I'm sure you've got the stopwatch on me.

A number of times this committee has asked other witnesses to provide written material after the meeting. One point you made, Mr. Chartrand, was that the matrimonial property code may be a solution that could be looked at. I was wondering if you could expand on that and send it to the committee so we would all have that to look at.

You said yourself you've thought of this but you mentioned it just briefly. I think that's something that would be of use to us. It may be an option that we would have because we are receiving other material.So I'd like to see that, if you could.

And without putting words in your mouth, I believe you said it could apply to all bands unless they have matrimonial and real property laws in place already. This committee is searching for something to do. We've heard we have to do it very quickly, so I think anything either one of you professors could send us that we could take into account while we're deciding this would help, because most of the testimony, or some of the testimony, has said we need action quickly.

And while you mention there are rules, and communities have had rules for decades if not centuries, we all know that sometimes they break down. Our job is to protect all our citizens, so we need to take some kind of action. We need to have some kind of plan in place so we can do that. So please send that on to us, and we'll take it and take it very seriously.

Do I have any time left, Mr. Chair?

● (1230)

The Vice-Chair (Mr. Jeremy Harrison): You do, actually. You have three minutes, Mr. Valley.

Mr. Roger Valley: I will pass it on to Ms. Barnes, then. I think she has some comments she wanted....

Hon. Sue Barnes: Thank you.

I was just wondering if either of you had an opinion on how you would propose the issue of on-reserve matrimonial real property be addressed for those first nations that subscribe to custom allotments. That seems to be our greatest issue and obstacle at this point in time, and yet it is very culturally ingrained in some first nations across this country.

And I'll push it even further. Should there be an insistence on some sort of registration so at least somebody knows that there is some record? Because right now no one at the first nation actually has a mapping out of these lands on those first nations.

Mr. Larry Chartrand: That's a good question. I think that custom allotment bands are, in one sense, exercising their inherent authority in terms of land management. Technically, the principles determining how individuals are allocated individual allotments within their reserve will vary depending on their custom; the west coast has a different tradition from the Mi'kmaq, etc.

Having them register those allotments wouldn't necessarily be a violation of their exercise of authority in land management, but oftentimes the allotments can't necessarily be surveyed in the same way you can survey allotments under the Indian Act, because there may be agreements between members on the reserve who have overlapping interests; there are sometimes a lot of overlapping interests in custom allotment bands. A lot of thought would have to go into what kind of registration system, or what it would look like.

It also depends on that community addressing the issue of matrimonial property, or whether they have also addressed matrimonial property. They may do custom allotments, but have they also put their minds to what happens to a custom allotment on the breakdown of a marriage, for example? Reference is made in the Senate report to a couple of communities that actually have that in place; others don't. So they're dealing with the issue of how they would resolve disputes between couples, oftentimes on an ad hoc basis, but oftentimes with reference to consultation with their elders in the community. So custom law is being applied—but we don't hear about that.

I think it would be important for the committee to think about doing more in-depth study on the communities that actually do custom allotments and resolve their marriage breakdown disputes internally within their community.

The Vice-Chair (Mr. Jeremy Harrison): Thank you.

We'll now go to Mr. Bellavance from the Bloc.

[*Translation*]

Mr. André Bellavance: Thank you, Mr. Chairman.

I have to admit that I'm a bit worried about our usual chair. She was supposed to be away for a few minutes. I hope she's not indisposed and that she will be able to join us again soon.

I'd like to thank the witnesses for what they have taught us this morning. It's a very important subject. I'm really happy that we are dealing with it in this committee. It may seem simplistic to say that the legal vacuum you referred to, Mr. McNeil, must be filled, but this topic has been heavily debated for years. There was the Erickson report on the protection of matrimonial property, entitled *Where are the Women?* Briefs have been submitted to the Standing Committee on Indian Affairs since 1984, when Bills C-47 and C-31 were being considered. There were also briefs on this topic submitted to the royal commission and others, on governance, were submitted to the department in 2000. Now, after the Senate committee, this committee is resuming the discussion.

Can you tell me how, in your opinion, all of these reports, all of these briefs and all of this information can be reconciled with the facts? There is a legal vacuum, there is a terrible and difficult situation, particularly for women and children in aboriginal communities. The matter is being discussed, but is it possible, in practical terms, to reconcile all of the legislation—the Indian Act, the Charter—and ultimately fill the legal vacuum?

● (1235)

[*English*]

Mr. Kent McNeil: Because of the complexity of the question, I think it is very difficult to know how to move forward. But for me, moving forward is going to have to happen in consultation with first nations and with their participation. So I think that Parliament should not act unilaterally. For this matter to be dealt with, it has to be dealt with in a way that first nations are in agreement with and comfortable with. That may mean compromise, as in any negotiations and discussions.

I would be very concerned about Parliament just stepping into the breach and doing it, because I think that's going to cause opposition and problems, and potentially legal challenges as well to the legality of Parliament's action.

[*Translation*]

Mr. André Bellavance: A number of legal experts have testified before this committee about the difficulties in reconciling, for example, sections 15 and 28 of the Canadian Charter and section 25, which has to do with the right to equality and aboriginal rights.

Is it conceivably possible to reconcile all of these provisions in order to fill the legal vacuum to which you and I have been referring?

[*English*]

Mr. Kent McNeil: The question is how section 15 of the charter and section 25 relate to one another—equality rights in section 15, but the charter should not be applied in such a way that it derogates or abrogates aboriginal rights. So how do those two relate?

In terms of gender equality, I think it's important, once again, that gender equality is protected in subsection 35(4), and one can argue as well that the gender equality section in the charter itself overrides section 25. In other words, gender equality is such an important principle for Canadian society that it takes precedence over aboriginal treaty rights. That's an arguable point, and I think that point can certainly be made.

Now, that may be an answer to the legal issue, but I don't think it's an answer to the political issue. I think it's essential politically, at least, if not legally as well, that this be done again with the participation of first nations rather than relying on section 15, section 28, and subsection 35(4).

Those arguments are there. There's a legal basis for those arguments.

The Vice-Chair (Mr. Jeremy Harrison): Thank you very much.

I'd like to give Mr. Martin the opportunity to ask a second round of questions.

Mr. Pat Martin: Thank you, Mr. Chair.

I'm still wondering how we square the circle regarding inherent rights, recognition of the inherent rights, and if Parliament ever sees the need to tread on those rights or to infringe. There have been recent Supreme Court rulings that say that consultation must take place first, and justification, and that consultation must include some accommodation of what they have heard. Consultation does not mean posting a bulletin on a telephone pole in a reserve saying "The law about your land management is about to change. Do you have any views on that?"

That's not consultation, by anybody's definition, but that seems to be the view of some. If it becomes inconvenient to recognize the inherent right, all that's really necessary is to consult and change, and that's what I'm afraid is happening around this table—and that's the mood of Parliament. They've identified a very real problem, a problem that's getting in our face and so glaring that it can no longer be ignored. As it's been left so long to fester and compound, the solution that seems to be contemplated is the imposition of the will, and a fairly Eurocentric will and view as well that we're going to make this in our own image so that it's palatable to everyone.

On the duty to consult in an issue of this scope and magnitude, what would be your view of adequate consultation and accommodation? How would you see that? What would that look like to meet the tests and the standards outlined in the Supreme Court rulings?

● (1240)

Mr. Larry Chartrand: That's a good question. The court has spoken in some detail as to the spectrum of the required degree of consultation, depending on the weight of the right at issue and the centrality of that issue to the community. The more important the right, the more consultation and the more insistence on accommodation. Ultimately, if the right is very serious and of fundamental importance to the community, there will be more insistence on full consent. So the court addresses it from the perspective of actual aboriginal communities who have a right.

If government were to consult all the aboriginal communities in Canada, all the first nations who collectively have an aboriginal right, let's say a right to decide how matrimonial property is decided on a reserve, and the Crown wanted to justify an infringement because legislation that had been enacted arguably infringed that aboriginal right, what is the legal obligation of the government in terms of consultation in that context? Do they have to go to every single aboriginal community in the country and consult with them? If they don't, then they risk that community going to court and saying, “We weren't consulted, and you can't impose that on our community.”

There really needs to be some thought about mechanisms that actually address the problems of practicality of government consultations. The Supreme Court of Canada has been silent on that so far. There have been some ideas flowing from the royal commission on that, and others, where there could be a mechanism of a ground-up delegation to the AFN, for example, which could decide those issues on behalf of all the communities. There could be an aboriginal third house of Parliament, perhaps.

There have been some discussions about making it more possible and more practical for government to meet its obligations, which obviously seems quite onerous if they start enacting legislation now that affects aboriginal rights. A lot of thought has to go into that when you're dealing with that consultation requirement.

The Vice-Chair (Mr. Jeremy Harrison): Mr.Chartrand, I'm sorry, we're going to have to cut you off there.

I'd like to thank our witnesses very much for coming. I've read both of your academic works, and I very much appreciate your testimony, as I know the rest of the committee members do.

My very strong recommendation at this point is that we have Ms. Bonnie Leonard come forward and give her presentation. There are still 16 or 17 minutes left before the adjournment at one o'clock. Ms. Leonard came all the way from British Columbia to be here, and she has a flight out at four o'clock. My very strong recommendation is that we hear her testimony and allow her to make her submissions right now.

Mr. Pat Martin: Mr. Chairman, I would like to intervene just to point out that I had the floor, dealing with the motion that I brought forward today, and I yielded the floor in good faith. I think you made a fairly unilateral ruling that we would now go ahead with witnesses. Reluctantly, I agreed, but now I'm going to insist that we take some time in this meeting to deal with the motion that I brought up today. It's properly in order, put forward weeks ago, and now I would like it dealt with within this meeting, Mr. Chairman.

I don't know what your intention is, and the clock will hit one o'clock soon, so is it your intention to give this witness time to make her presentation and leave adequate time to conclude what we began with today?

The Vice-Chair (Mr. Jeremy Harrison): The meeting is scheduled to end at one o'clock today. I know all of us have very busy schedules and are scheduled to be at other places for one o'clock. The meeting will end at one o'clock today.

As I said, I would strongly recommend that we allow Ms. Leonard to make her presentation. She came a long way to be here, and, I might add, at taxpayers' expense to buy the ticket from British Columbia. I don't think it would be too much to ask that we deal as the first order of business at the next meeting with this motion, rather than spend literally another $8,000 for Ms. Leonard to go back and then come back again. I really don't think that's too much to ask.

● (1245)

Hon. Sue Barnes: Mr. Chair, I am going to suggest that we go another half-hour today. The clerk has advised me the room is available. I think it is in order to hear the testimony of Ms. Bonnie Leonard first, then go to the motion of Mr. Martin, and then come back to the questioning. I would certainly be prepared to stay.

The Vice-Chair (Mr. Jeremy Harrison): As I said, the meeting will end at one o'clock today. It was scheduled to go to one o'clock, and we all have busy schedules.

The question is, do we want to hear Ms. Leonard give her testimony? As I've said, I recommend that we do.

Mr. Pat Martin: Mr. Chairman, it isn't unusual to extend. In fact it's the ordinary practice of this committee to extend. I've been here when we've extended half an hour or 45 minutes. I don't know what your rush is today.

The Vice-Chair (Mr. Jeremy Harrison): With all due respect—and as Mr. Martin knows, I do respect Mr. Martin—the meeting will end at one o'clock today.

Mr. Pat Martin: We have two vice-chairs, do we not?

Hon. Sue Barnes: I will say that I would like to hear from Ms. Bonnie Leonard. It was unfortunate we went to a round two. That is the chair's prerogative. But we had time and the chair knows how to use that time.

The Vice-Chair (Mr. Jeremy Harrison): Do we have general consensus? Then I would ask Ms. Leonard to come forward.

Thank you very much, Ms. Leonard, for your patience. I apologize on behalf of the committee for the short period of time you have for your presentation. We do look forward to hearing it.

Ms. Bonnie Leonard (Lawyer, As an Individual): With that form of introduction, I guess this had better be good. First off, I apologize for getting in the way of other business of this committee.

My name is Bonnie Leonard. I am a lawyer from British Columbia. I was called in May 1997. I've practised family law for a period of approximately six years. I am a status Indian. I am the former chief of the Kamloops Band. I served as chief for three years, from December 2000 to December 2003.

I'm divorced. My divorce occurred early on in my life and it did not involve any property on reserve. This took place off reserve. However, that was a motivating and career-inspiring experience, the divorce itself. I am living in a common-law relationship at this time on reserve.

With that by way of background, I feel very qualified to give testimony today, and I thank you for this opportunity to provide some input into this very important issue.

By way of opening comments, I would ask the committee to consider the mix of social and legal matters before it. It's very complex, matrimonial real property and marital breakdown. There are emotions that run very high, and there is a danger, I feel, in the legislative realm of going too far one way or another to address some issues that should be properly kept with the individuals or in the home.

Marital breakdown, regardless of your race or your gender, will feel unfair to anyone who's involved in it, for both spouses or partners. Ultimately, at the end of the day, no one is going to win or feel completely satisfied with the results of the marital breakdown. That's a reality that I think people must face when dealing with this.

I have not, during my career as a lawyer, ever had a client tell me how completely satisfied they were with their property settlement—and I'm good. So I know there's more to this than just money. There's more to this than just division of property. There's a tremendous amount of emotion behind this, and it sometimes clouds people's judgment as to what's best for them at that point of turmoil in their lives.

I would ask the committee to consider that. It's also an individual responsibility, marriage and those commitments as to common law. It's not necessarily the responsibility of the government or a band council to involve themselves in what I believe is a very private matter.

That said, the cause and the social matter or issues of a matrimonial breakdown is irrelevant to me at this time. The effect of it or the fallout is what must have some form of structure that will ensure fair treatment or fair process for all involved.

Indians, as we are referred to under the Indian Act, are in a unique situation, as I'm sure you've heard a number of times during testimony here, by virtue of section 91.24. In order to facilitate change that will improve the current legislation, we must examine and consider the historical rationale for Indian Act provisions that are now recognized as causing some unfair situations. We need to ask ourselves, can these provisions be altered, amended, or changed and still preserve the core intentions?

The historical core purpose for the reserves being set aside for the use and benefit of a band of Indians seems to be, from my perspective, to preserve and protect the land base for future generations. Therefore, there has been no alienation provision that would help facilitate that.

Future generations, I might add, are generally the offspring of those people who are involved in the marital breakdown, so that might come into play in some options this committee could consider.

● (1250)

Legislative change is important. It is the federal government's responsibility. I do not think this can be left to the provinces, although there is a remedy in provincial legislation for compensation, certainly in British Columbia. This legislative change, if there's one to be made, must be made in the Divorce Act and the Indian Act.

By encouraging or extending provincial legislation to the reserve lands, the federal government is removing itself from its constitutional responsibility for Indians and lands reserved for Indians. I strongly say that this change should come from within Parliament.

I heard earlier the discussions of the first nations governance role—self-government, inherent right, those kinds of things. I agree that any legislative change should be adopted on a provisional basis; that is, it should be applied to first nations until such time as a first nation concludes a self-government agreement, adopts its own land code or bylaws, or otherwise exercises jurisdiction in the area. There is nothing stopping first nations from exercising inherent rights today.

We heard the question to Mr. Chartrand about why people haven't taken the initiative and he gave a number of reasons relying on the same old colonial effects. That's not good enough for me. As a woman, as an aboriginal woman, I think that this Parliament should pass legislation and not wait for the first nations to be ready for it. You've got to light a fire under their asses, the band councils. Without parliamentary action, nothing will change. You must force this issue.

In relation to our culture and traditional connection to the land, in a matrimonial breakdown and property division, sentimental attachment should not carry the day. To claim that the division of matrimonial real property on reserve will erode our cultures and traditions is a falsehood. An individual spouse may temporarily lose possession of material property or access to certain lands on reserve. This, however, cannot be interpreted by that person to mean that they're losing their culture or traditional connections. In reality, our culture and traditions live within our hearts and no one can take that away by taking away our house.

If we are alienated from our community as a result of a marital breakdown, there are other options for us. But ultimately, we maintain and hold our culture and our traditions within our minds and our hearts. We take that with us everywhere we go.

Historically, our people did not reside on reserves. We travelled extensively on the land, seeking the riches of the natural resources as we moved with the seasons. I ask the committee to consider this in any legislative changes they may be making. The committee should not be swayed by people who come before this committee and say we have a connection to the land that cannot be disturbed. Our connection to the land does not come from the possession of a house.

An existing remedy in the province of British Columbia—and that's the only province I can speak to—is the compensation orders that the provincial government is able to make in relation to the division of matrimonial property. It's problematic because of enforcement. There's a lack of money. The nature of reserve lands makes it very difficult for one spouse to borrow against the property in order to pay out the other spouse, as would normally happen in a marital breakdown and a property partition-and-sale order.

The types of housing we have are different, and this has to be taken into consideration. We don't have a mortgage like most people with a property held in fee simple.

● (1255)

We do have those things with certificates of possession and mortgages, but there's also another type of housing, social housing, where you're grouped in with a phase of houses that were built with social funds, and you pay a percentage of your income—whatever that might be—as your rent, and you rent that basically for 25 years until the band has paid off that phase of housing. Those kinds of things need to be taken into consideration when looking at compensation orders.

As an option for dealing with this without legislative change—and this would be an immediate option that could be adopted—I would propose that a pilot project be established whereby a lending institution would be created and specifically mandated with providing funds to those people who have obtained orders of compensation. What I envision is something similar to the First Nations Agricultural Lending Association, where the government provides the start-up capital, the lending capital. The funds would be administered by a group, and they'd be specifically for compensating women or men in these situations. You could have a flexible payment plan, and there could be a formal evaluation system adopted.

This is another area of murky grey when you're looking at the value of matrimonial property on reserve. Some people, as far as courts are concerned, like to think that it's less valuable, whereas in fact it's more valuable because it's so hard to get, in terms of being a member of a band and obtaining housing on reserve. There's an argument on either side.

I would suggest that once a person goes through the court system and the courts are aware of this fund being available, the court would be more likely to order compensation orders, and evaluations could be made by the courts based on the evidence. It would be on a case-by-case basis. And once a person had the court order for compensation they could then apply to the lending institution to obtain the loan they would need to pay the other spouse their fair share of the matrimonial property.

This would serve several purposes, in that it would enable the person who had been ousted from the home to have a clean break—that is, to start fresh. They could buy property on the reserve again if they chose to maintain their connections to the community, or they could move on and move forward to another area, another era of their life.

I have one minute, so I'm going to quickly wrap it up and say that amendments are necessary and needed.

Interim possession orders with enforcement clauses are absolutely necessary. Interim is the key. I think you can go a long way with that and put some range, from months up to a maximum of potentially, I would suggest, five years, but leave it to the courts to determine on a case-by-case basis what an interim time period would be for that particular couple.

Consent orders in separation agreements need to be recognized as enforceable so long as they do not facilitate the alienation of the land and historical core principles that were initially considered.

The Indian Act and the Divorce Act need to be amended to allow for forced partition and sale of the home to the band or the band members. This would result in another option being available for those people who could not qualify for funding.

● (1300)

The Vice-Chair (Mr. Jeremy Harrison): Thank you very much, Ms. Leonard. We very much appreciate your being here, and we would have liked to have had the opportunity to—

Mr. Lloyd St. Amand: I have a point of order.

The Vice-Chair (Mr. Jeremy Harrison): Yes.

Mr. Lloyd St. Amand: If I may, with the greatest respect, Mr. Chair, you have, in something of an uncommonly Napoleonic way, decided for all of us that this was going to end at one o'clock. This witness, as you correctly pointed out, has travelled however many—

The Vice-Chair (Mr. Jeremy Harrison): You have a point of order, Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: We always respect the chair and we are going to continue to do so, as you will.

He is the chair, it's not Ms. Barnes. Okay? It's really too bad, but it's not Ms. Barnes. She should get that through her head once and for all.

So respect the chair.

[*English*]

Mr. Lloyd St. Amand: As Mr. Chair correctly pointed out, at taxpayers' expense Ms. Leonard has come some considerable distance. I would like to request that we extend this sitting until 1:30 to accommodate her in the interest of the committee, and frankly—

The Vice-Chair (Mr. Jeremy Harrison): Mr. St. Amand, I've made it clear from the beginning that this meeting was to end at one o'clock. This meeting will end at one o'clock.

We thank Ms. Leonard. If we hadn't had wrangling for half an hour before the meeting actually got to start, we would have had time for Ms. Leonard to give her entire testimony.

Thank you very much for coming, Ms. Leonard.

The meeting is adjourned.

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