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Chair

Ms. Nancy Karetak-Lindell

Standing Committee on Aboriginal Affairs and Northern Development

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● (1105)

[*English*]

The Chair (Ms. Nancy Karetak-Lindell (Nunavut, Lib.)): I'd like to call to order meeting 30, on this Tuesday, April 19.

I want to give my apologies for my absence from the last meeting; I had a medical appointment.

I understand that Jeremy, who was chairing the last meeting, asked that this be put first on the agenda of this meeting. I understand that it was announced verbally that this would be the first item of the next meeting, which is why I've put it as the first topic. I hope we can dispense with this early, so that we can get on with the witnesses for matrimonial real property.

Mr. Martin.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Madam Chair.

I'm glad to have this opportunity to finally deal with the motion I put forward three meetings ago. Actually, my motion of February 21, 2005, was introduced three meetings ago. And ultimately, a second motion on the same subject matter was introduced by my colleague, Mr. Prentice, and ended up being voted on in the House of Commons, as we know. I'm glad to resume debate on my original motion today. We now know that the motion put forward by Mr. Prentice and voted on in the House of Commons does not have the support of the groups representing first nations across this country.

I will first state where we are in the course of this debate. We are now debating the amendment to my original motion, as put forward by Mr. Cullen at the last meeting. At that time, I believe we felt it wouldn't be fair to go ahead with it until the version in both official languages was circulated and available to all members.

Now that we have the issue properly on the floor of this committee, with the original motion I put forward and the amendment put forward by Mr. Cullen, I would say simply and briefly that the motion we passed in the House of Commons fails the test of the residential schools survivor groups, the Assembly of First Nations, and virtually all other organizations dealing with the sad history and tragic circumstances of the residential schools. I would simply point out that the motion we voted on in the House of Commons recommends terminating the ADR process, but doesn't put anything else in its place. We've had advocates for victims tell us this cuts adrift those who are halfway through the ADR process, who have nothing to fall back on. This is very much a concern.

The motion that I put forward today and that is on the floor today recommends modifying the ADR process in such a way that it is timely and just, and that the money allocated and set aside for compensation of victims will in fact get into the hands of victims more quickly, and not be burnt up by lawyers and bureaucrats.

Secondly, the motion we voted on in the House of Commons, or Mr. Prentice's motion, recommends that the process be handed over to the courts to supervise and enforce. While we agree that some third-party oversight would be beneficial, and even necessary, in making sure that the agreement we strike survives a change of government, we do not believe that the whole process should be handed over to the courts, because that, frankly, would be handing it back over to the very lawyers—many of whom work on contingencies—who form part of the problem today.

The third thing is that the motion of Mr. Prentice only recommends a partial truth commission, involving survivors only. The motion that I put forward contemplates, in a more thorough way, a comprehensive truth and reconciliation process for all parties, because it's not just the survivors who need to tell their stories, but there are also non-aboriginal people involved, and church groups, and government bureaucrats who may need to come forward to a truth and reconciliation commission.

Fourth, the motion that Mr. Prentice put forward is silent on an apology of any kind. I would like to think that we can listen to the call for a full apology.

The motion Mr. Prentice put forward was silent on issues such as the methodology used in compensating victims, whereas the motion that I'm asking us to debate today recommends that we be guided by the Irish model, which weighs the compensation of victims based on the impact of the abuse more than on the technical details of the abuse that took place.

● (1110)

In other words, in the Irish model of the Irish children who were abused in technical schools, only 25% of the compensation is based on how many times you were struck and by whom, and 75% of the compensation is based on the effect that it has had on your life and the detrimental impact it's had on your ability to move forward with your life.

For another thing, Mr. Prentice's motion was silent on the administration of a reconciliation payment. The model I put forward calls for the AFN to be involved and for the administration to be dealt with through a first nations entity.

Finally, the motion Mr. Prentice put forward that we voted on was silent on the need for reconciliation. Again, my motion, which I'm asking for us to deal with today, sees reconciliation as the rationale for the entire compensation program.

Briefly put, and I won't debate this any further, I'm asking for the committee to reconsider—not to strip away the recommendations put forward by Mr. Prentice but to add to that body of thought—so that the general public, and more importantly, first nations, know that this committee has considered things beyond what Mr. Prentice brought to it, and that we have views that add to the recommendations of Mr. Prentice that we are not wholly in favour of abolishing the ADR process and putting nothing else in its place.

So I would ask the committee members if they will reconsider.... Well, actually I'm not asking you to reconsider; I'm asking you to consider for the first time supporting the motion I put forward, as amended by Mr. Cullen.

The Chair: Thank you, Mr. Martin.

I have a list of speakers here. I have Mr. Jim Prentice.

Mr. Jim Prentice (Calgary Centre-North, CPC): Thank you, Madam Chairman.

I think it's important that we put the report and the specific date points that were approved by the committee in focus. This was a point of commencement, in a sense. It was passed with the approval of three opposition parties at the time, and I think that the points that were made in the report and in the recommendations still hold validity.

Let me start by saying that the way in which the recommendations are expressed is that they come forward from a committee to the House of Commons; they've been voted on in a concurrence motion by the House of Commons. They are not, however, decisions of the Government of Canada and the administration of the program, and the specific items that are referenced are still entirely within the prerogative of the jurisdiction of the Government of Canada. This is a recommendation that our committee put in front of the House, with approval of the majority of the members of the committee, for consideration. That's the way it's worded. If you see, it says:

> That the Committee regrets the manner with which the Government has administered the Indian Residential Schools Claims program and recommends that the Government give consideration to the advisability of Government taking the following steps:

This was put before the government for its consideration. That's the first point.

Clearly, not all of the issues surrounding the residential schools program are resolved in these eight points, but it is a point of commencement. It was important to get it before the House, and the government now needs to consider this report and move forward and make decisions.

I'd like to comment on a couple of the specifics. First, I thought the recommendations were very clear, that the committee was calling for a national truth and reconciliation process. I think that's very clear in item 6, that the committee "shall cause a national truth and reconciliation process to take place in a forum that validates the worth of the former students and honours the memory of all children who attended the schools".

There's certainly no intention in item 6 to limit the participation. Clearly, a national truth and reconciliation process, if it's properly structured, would have to have the participation and the involvement of everyone who was involved in this chapter of Canadian history. So there's no intent on our part to restrict the truth and reconciliation process.

Another point Mr. Martin has made is that the suggestion was that this be handed over to the courts. That is not the case. Item 3 says very clearly that "the government engage in court-supervised negotiations with former students to achieve a court-approved, court-enforced settlement for compensation". There's no intention to hand the process over to the courts, but rather that there be some degree of supervision of omnibus negotiations that are taking place.

One other point was made with respect to the termination of the ADR process. We heard very compelling evidence about the ineffectiveness of the ADR process and how little of the money is making its way through to the victims. Surely, we're not recommending that the government carry on with that process without change. Again I would point out that in item 5 we basically said that the government has to expedite the settlement of those cases. Those are the same cases.... The ADR cases are the cases involving aggravated circumstances, and we said there needs to be a separate restorative judicial process. We said in item 1 that all of this needs to be done on an urgent basis. So I think that the way in which the committee put this before the House addresses the very important way forward.

Again it's been put forward as a recommendation for the government to consider, and the government will have to decide how to proceed. But I think the eight points we arrived at led to a constructive debate in the House of Commons. In a sense, the ball is in the government's court. The committee has made a recommendation, asked the government to give consideration to these points, and the government, as the executive branch of the government, will have to make decisions.

● (1115)

I think it's important that the committee stand on the recommendations that we've made and based on the information that we've heard. Those are our positions.

● (1120)

The Chair: Thank you, Mr. Prentice.

We now have Mr. Cleary speaking on the amendment. This is on the amendment to Pat Martin's motion. Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary (Louis-Saint-Laurent, BQ): Madam Chair, all of this presents a lot of problems for me.

This Committee has been dealing with this issue and concluded that a motion was required. We voted for that motion. Later on, someone decided to politicize that issue and to try cancelling the motion. Yet, this motion was moved in good faith on the basis of discussions between opposition members. We had looked for the best solutions while respecting each party. This is the reason why we could reach a consensus on this side. That consensus is reflected in the motion that was passed.

It is proposed now to change all that. I think that this new proposal doesn't really take into account what we said, because I really believe that I have worked with the best interests of the Indian people at heart. I find it unconscionable to say that we are betraying the Indians. I cannot agree with that. I will not cancel the work made by this Committee by filibustering as does Mr. Martin and members opposite would do if they were in my shoes. I shall not do so because I want to serve the interests of the victims, the people who are waiting for the decision that should come from the Department of Indian Affairs and Northern Development.

Madam Chair, I am not talking about the Justice Department which has never been here since I have been working on Aboriginal issues. Those people have always interfered with every interesting proposals made by First Nations people. They are still working on that file and the dog slaughter issue. But this is another matter.

We are prevented from going forward. Canadian voters have elected a minority government. The decision made by citizens is not being respected. When rules are established because you are not as strong with a minority government you are maneuvering to buy time and trying to interfere. But this is very risky for Aboriginal people. I shall explain to you why this is risky and why I am so determined to follow through.

If there was an election tomorrow before a decision is made by the government, do you believe that the Liberals would reopen this file later on? First of all, they won't be re-elected and they will be replaced by a Conservative government. By supporting the motion, I was at least hoping to have the Conservatives on my side when they will be in power. I did not do it for myself. I am not trying to please the Conservatives. I am here to protect Native interests and make sure that the residential schools issue will still be alive after the Liberal Party is gone. They want to put this whole issue on ice and prevent us from following through. Nothing will be officially done by the Liberal Party of Canada before the next elections. And after the elections, they won't be here anymore.

● (1125)

Why couldn't we, as politicians, protect those people who have been waiting for almost 50 years rather than playing political games?

I am not in politics to play games. I am too old to play games. I am not going to abandon a valid cause. If you want a vote, let us vote immediately and deal with it once for all.

[*English*]

The Chair: I still have two speakers on the amendment.

I just want to caution everyone that when we try to recognize the rights of the aboriginal people in the country, we make a commitment, as their country, to listen to the groups that are representing the aboriginal people as speaking for the aboriginal people. When we try to change policies or move in a new direction we try to do it with the blessing of the national organizations that represent the people. If we start making decisions that don't have the blessing of those national organizations, then that makes aboriginal people very uncomfortable, because they are elected by their people to represent them at the national table.

So that is my only input into this debate. We have to be very careful of what message we're sending to the national organizations when we do not take their advice on critical issues such as this. I understand we were culpable now.

Hon. Sue Barnes (London West, Lib.): A roll call vote, Madam Chairman.

The Chair: I'll just get the clerk to call the names for the vote.

The Clerk of the Committee (Mr. Jean-Philippe Brochu): On the amendment first.

(Amendment negatived: nays 6; yeas 5)

The Chair: We will now vote on the....

Mr. Martin.

Mr. Pat Martin: Madam Chairman, I'd like an opportunity to speak to the main motion.

The Chair: Mr. Martin, on the main motion.

Mr. Pat Martin: There's one point I would like to make prior to the vote on the main motion, because I think it has been missed somehow by my colleague.

Well, there's more than one point, but the first point I will make is on what Mr. Prentice's motion lacks. He is right; as a matter of record, I voted for Mr. Prentice's motion at this committee in order to get it into the House, simply because the Conservatives would not support my motion as it was. My motion calls for lump-sum compensation for victims, universal compensation for victims, where eligibility is based on evidence that you were there. If you can prove that you attended that residential school for that period of time, we believe some compensation should flow to you. That's what the Canadian Bar Association recommended, that's what the Assembly of First Nations recommended, and the experts of this report, which include a judge from the Yukon and law professors from universities across the country. That's the substance of this report, universal lump-sum compensation.

The Conservatives wouldn't support that, so my motion was at risk of dying on the vine, as it were. So I supported their motion in order to keep this issue alive. I did not support their motion under any enthusiasm for the content of their motion or the merits of their motion. I wanted this subject in the House of Commons, where I thought it belonged.

We had a good debate in the House of Commons. People said all the right things. Even the speakers from the Conservative side said all the right things about what we heard and how serious an issue it is to get the money into the hands of the victims and not burnt up by lawyers. Everybody made good speeches. I've listened to all my colleagues from all the parties. The problem is that when you read the eight points of the Tories' motion, it doesn't reflect the speeches they made. So I'm here to say that if we allow that to stand as the historical record of the opinion of this committee, we're doing a disservice to any future government.

My colleague Mr. Cleary seems convinced that the Conservatives are going to form the next government, and therefore he wants to side with the winner. That's simplistic for a number of reasons. We want the permanent record to show, no matter who forms the next government, that many of us on this committee believe strongly there should be lump-sum universal compensation, because that's what we heard from Indian country. That's what the duly elected leaders of first nations across the country are saying.

No more spending millions of dollars trying to paint victims as liars—we want that money to go into the pockets of the victims.

I don't know why Mr. Cleary can't accept that, but that's what I understood him to say in his speech. That's what I understood the Conservatives to say in their speeches: no more wasting money trying to paint victims as liars; let's get that money into the pockets of the victims.

Well, that's what this motion says. That's not what the Conservative motion says. When I hear this sanctimonious pap about having to get on the side that's winning and support this motion because the Conservatives will form the next government, so let's side with the Conservatives, I've never heard such a bunch of nonsense in my life. Let's side with Indians. Let's look around this table and do what's right for the victims, for a change. That means getting the money into their pockets.

Even though I think my Conservative colleagues believe that's what we should do, they couldn't sell it to their own caucus, right? We can't be giving billions of dollars away to Indians again just because they complained that they were abused in a school.

Well, if you want a report that accurately reflects what we heard and accurately reflects what all the leading authorities across the country say about residential schools, then you would support my motion, not some watered-down version, not some cowardly version that sidesteps, in very cleverly chosen language, the substance of the point here, which is blanket lump-sum universal compensation for victims. That's what we were missing when we supported Mr. Prentice's motion.

So as much as I celebrated the idea of getting this into the House of Commons, it was always my plan on behalf of aboriginal people to use that as a stepping stone to further the debate, to keep the debate before this committee, to add to what the Conservatives brought to the debate, many of which are legitimate points, and build from that to paint the whole picture that we agree that the system is broken currently and we agree that something should be done. We agree that Parliament should be seized of the issue, but we should have a report that does in some way reflect what we heard.

● (1130)

We have an opportunity here today to leave that permanent record for whoever forms the next government. People will know that the House of Commons Standing Committee on Aboriginal Affairs and Northern Development thinks that the lump-sum compensation is a good idea.

The Chair: Thank you, Mr. Martin.

Mr. Lunn.

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

I'd like to respond to a few of those points.

First of all, I want to respond to Mr. Martin when he says that we cannot give billions of dollars to Indians just because they claim they were abused. Well, Mr. Martin, I want to say unequivocally, on the record, that aboriginal people do not claim they were abused: they were abused.

Mr. Pat Martin: Well, then, vote for my motion.

Mr. Gary Lunn: Unequivocally, they were abused, and I'm quite offended that you would make a statement saying that this was a claim. In fact, there's no dispute here about the horrible atrocities, about the way in which aboriginal people in this country were abused by our people, by non-aboriginal people. We must never, ever forget that.

As we travel across this country, we see the fallout from this. We see what happens on many reserves. And I'm not stereotyping all of them, but some of the conditions are absolutely horrendous. That is because we have failed aboriginal people in this country miserably, one decade after another decade after another. It's time for us to do the right thing and end some of this.

I often say, when I'm speaking with non-aboriginal people, I've yet to meet anyone who would trade their place in society for the place of an aboriginal person. Why are they in such horrific conditions, in some cases? Our society has failed aboriginal people miserably. I want to put it on the record that they were abused. They were abused in the most horrible way we can possibly imagine. So I want to correct Mr. Martin when he says that they claim they were abused. That is just not acceptable at all.

To go on to the next point, he said this is about who's forming the next government, about the fact that the Conservatives might win. That's not what this is about. This is about doing what's right, what's right for aboriginal people. This committee put a motion forward to the House. It was passed by this committee, and was passed in the House of Commons, the entire House of Commons, 308 members of Parliament. What did that motion do? That motion asked the government to act, and no more. The committee does not have the power and the concurrence motion does not have the power to dictate. The only thing we can do is recommend to the government to do something and to act.

I sat here and listened to witnesses talk about how millions and millions of dollars are going to thousands of lawyers and to administrative costs when we're resolving such a small number of these cases. This is not acceptable.

Mr. Martin suggested that a lump-sum payment should be in the offering. Well, I say to the government, Madam Chair, bring it on. We will look at that in the most non-partisan way, and we will work to bring forward a solution. We will absolutely consider it in the fairest, most open, transparent way. And if there are things we could improve on in it, we would bring those suggestions forward as well. But the responsibility lies with the current government to act, and to act now. People who were abused in these residential schools are dying every single day. That's what this motion....

They do not have to abandon the ADR. Yes, we believe they should. The House of Commons believes they should. They passed a motion to that effect and to bring forward something that would work. But it's a recommendation. The power lies within the government to act, and to act now.

To come back with another motion, Madam Chair, with another set of recommendations—the government can look at that, but the House of Commons has already passed a motion. It's been done. So now it's time for the government to come back and put a solution on the table that will work for first nations people. I can assure you that the Conservative Party will give it every fair consideration. Our interests are only to see that the people who were abused—and not allegedly abused but absolutely abused, in the most horrific circumstances—receive just and fair compensation, that we don't spend 85% of the money allocated in administration or process, that we don't resolve only a small percentage of these cases, but that we actually give these people compensation before they go to their graves. And that's what we're facing.

To conclude, Madam Chair, the Conservative Party of Canada will respond in the most non-partisan way. We will give it every fair consideration. But the responsibility right now lies solely with the Government of Canada to accept that the motion has passed. The motion put forward by this committee—not Mr. Prentice's motion, but this committee's motion—went to the House of Commons and it passed. The government now has a duty to first nations people to respond and come back with a proposal, come back with solutions, so that the first nations people who were so horribly abused get fair and just compensation as quickly as possible.

Thank you.

● (1140)

The Chair: I will now call the question. Are we doing another? Okay. I will have the clerk read out the names for the new motion.

The Clerk: Mr.—

[*Translation*]

Mr. Bernard Cleary: Madam Chair, I had asked for the floor.

[*English*]

The Chair: I have members asking for the question. I have other people asking to speak but I will not have people asking for the question.

The clerk advises me that we have to allow the other speakers to speak, but I have Mr. St. Amand on the list before you, Mr. Cleary.

Mr. Lloyd St. Amand (Brant, Lib.): Just very briefly, Madam Chair, I'll be supporting Mr. Martin's motion. I'll be pleased to support it.

Mr. Prentice's motion, however well intentioned, in my view, would have caused the victims to be in something of a legal limbo, where they've been for too long.

Mr. Prentice's motion sought the termination of the alternative dispute resolution mechanism. The Assembly of First Nations wants it to continue in a rehabilitated form. That's the sum and substance of Mr. Martin's motion. I'll be voting in favour of it.

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

Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: Madam Chair, if people are really sincere, they should be willing to find a satisfactory solution for the Indian people who went to those schools. This is what we are all hoping for. So let us take the means to do it.

It was clearly explained earlier by the Conservatives. The ball is in the government's court. It is up to them to make a decision. They usually have no hesitation to go against our proposals as they always do.

If they want to help the Indians, they should do so. Personally, I would applaud them. But they should act. They do not want to act. Why? I have no answer to that question. Why are they dragging their feet? Why do they want to withdraw their offer? It is their responsibility to act. The government should make a decision and give us a clear proposal, after which we shall see what to do. But the government is not really willing to act. If it did, this issue would have been solved a long time ago as we have been talking about this for almost 20 years. The government has been waiting until the last minute until it was forced to fulfill its responsibilities, and even now it is fighting hard not to do what it should do. Why? It is up to the government to act. It has the long end of the stick. It might bring about some criticisms but it should do something. The government tried to interfere in other files. In the Inuit file, they tried to impose a formula that did not make any sense. They didn't implement the motion but they tried. It will not work but at least they tried. They should try to do something. If the member wants to support Mr. Martin or the Assembly of First Nations, he should do so. He must make a decision instead of making believe that he will support the one or the other, as usual.

I am waiting for that decision. I won't change my mind as long as a decision has not been taken. It is very clear.

● (1145)

[*English*]

The Chair: Mr. Cullen, please.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Madam Chair.

I will be very brief, because I know there are witnesses waiting and we've all had our views expressed on this point.

I just wanted to remind members that it was this government that asked the Assembly of First Nations to review the process and to come forward with a set of recommendations. The government, as we speak, is very much engaged with the Assembly of First Nations to find solutions to improving the process. But as we speak, as well, there are claims being settled. There are new people signing up for the alternative dispute resolution mechanism. The government is not sitting back doing nothing. There are active discussions going on, as we speak.

I'd just like to go back.... The member for Saanich—Gulf Islands said that the Conservative motion is about doing what's right for aboriginal people. But the Assembly of First Nations does not agree with that motion for a number of reasons, which I won't get into again. It's all a matter of the public record.

This is the problem we have with the Conservative Party and their paternalistic attitude towards aboriginal peoples. The Assembly of First Nations, which is the premier organization in Canada to deal with aboriginal issues, says they don't support this motion for a number of reasons: it's far too driven by the courts process, there's no recognition of reconciliation, etc.

I will stop there, Madam Chair. I know there are witnesses waiting. I would urge you to call the question, and let's get on with the business of government.

The Chair: Thank you, Mr. Cullen.

I will now call the question.

The Clerk: A recorded vote?

The Chair: A recorded motion. I will have the clerk call out the names, please.

(Motion negatived: nays 6; yeas 5)

The Chair: The motion is defeated.

We will now go on to the second item on our orders of the day, which is the study of on-reserve matrimonial property.

We are going to suspend for one minute to give a chance for everyone to get everything in order, because this portion of the meeting will be televised.

● (1148)

(Pause)

● (1150)

The Chair: I call the meeting back to order, please, for our study of on-reserve matrimonial real property.

First on the agenda, we have a witness from the Indian Taxation Advisory Board, but due to Chief Strater Crowfoot not being here yet, we will go on with the officials from the Department of Indian Affairs and Northern Development, represented by Holly King, acting director of women's issues and gender equality; and the Department of Justice, represented by Tom Vincent and Margaret Buist.

Ms. Barnes.

Hon. Sue Barnes: Could the clerk try and reach Mr. Crowfoot by telephone, please? I know he's in Ottawa.

The Chair: We're going to try. I just want to make sure that we start with—

Hon. Sue Barnes: I agree. I think that's a good plan. I just would like him to try to contact him while they're testifying.

The Chair: If I can have the witnesses go ahead with their presentation....

Ms. Margaret Buist (Counsel, Legislative Initiatives, Department of Justice): Thank you very much, Madam Chair. I would just do some introductions first.

I'm Margaret Buist, from the Department of Justice. I'll be speaking second. My colleague from the Department of Justice, Tom Vincent, will be speaking first. Holly King is here. She's acting director of women's issues and gender equality with the Department of Indian Affairs, and she'll be here to answer any questions the committee may have from the Department of Indian Affairs' point of view.

The Chair: Thank you.

Go ahead, please.

Mr. Tom Vincent (Counsel, Operations and Programs Section, Department of Justice): Thank you, Madam Chair.

My name is Tom Vincent. As a Department of Justice lawyer, I'm assigned to the Department of Indian Affairs and Northern Development, Legal Services Unit. I provide advice to DIAND with regard to bylaws, elections, and estates.

I am here to discuss the extent that first nations are able to address the issue of matrimonial real property on reserves through their bylaw-making power. The bylaw-making powers under the Indian Act are found under section 81.

This section affords band councils bylaw-making powers very much like those of a municipality. These powers are mostly local in nature and include such things as construction and maintenance of roads and fences, land-use zoning, destruction of weeds, and some provincial authority such as management of fish and wildlife.

Of interest to this committee would be the bylaw-making power for the removal and punishment of trespassers. This is found under 81(1) (p) and also 81(1) (p.1), “the residence of band members and other persons on the reserve”, and 81(1) (p.2), “to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band”.

The significant limitation to the Indian Act bylaw-making power is that there is no power to regulate relationships for property regimes between band members. As a mere bylaw power, all that a band council can do is create bylaw offences and these are punishable by fine or imprisonment, which you will see under 81 (1) (r), to a maximum of $1,000 or 30 days, or both.

Therefore, a band bylaw cannot dictate who can use reserve lands. It can only make provision that if someone uses reserve lands in a certain way they may be punished by fine or imprisonment.

Unlike provincial governments, which have constitutional authority over property and civil rights between citizens, band councils lack authority to establish rights between individuals. Section 81 simply does not empower a band council to make rules that deal with this issue. If a band council were to pass a bylaw that sought to govern civil rights between band members, or between band members and non-band members, then the bylaw would be considered ultra vires—that is, beyond the authority of the band council—and any court would be able to strike it down. So if the band council accused somebody of doing something contrary to a bylaw, that person would be charged, would go to court, and in their defence they would raise the issue that the band bylaw is ultra vires.

Thus, the bylaw making power is not a source of local autonomy for band councils to address in preserving property rights of band members and non-band members. In the past, a few first nations have sought to regulate matrimonial real property, such as the Ojibways of Sucker Creek in Ontario. But these bylaws have been disallowed by the minister. They have not come into effect, so there has been no opportunity to challenge them.

Another major obstacle to the limited bylaw making powers is found in the opening words of section 81, which states, "The council of a band may make by-laws not inconsistent with this Act, or with any regulation...". There are two important points here. The council may make bylaws. It's not that they must make bylaws, so bylaws are entirely optional. There's no power for the minister to compel a first nation to pass bylaws.

The second point is that bylaws are invalid to the extent that they are inconsistent with the Indian Act or the Indian Act regulations. Therefore, there is no way that a bylaw can interfere with the land-holding regime that the Indian Act has already set up. As you know, the Indian Act land-holding regime restricts land holding to band members. Land can only be transferred to band members as a matter of sale or gift between estates through will or intestacy.

The case law with regard to residency bylaws is quite scant. There is one reported case of a first nation that passed a bylaw prohibiting non-member spouses from residing on the reserve. At the Six Nations Reserve in Ontario the band council prosecuted a non-band-member spouse, a Mrs. Pamela Henderson, for residing with her husband on the reserve. She was convicted under the bylaw and she appealed to the Ontario Court of Justice, which is admittedly not the highest court in the land. There the court upheld the bylaw and entered a conviction against her.

● (1155)

Interestingly, the court found that the bylaw actually infringed her equality rights under section 15 of the Canadian Charter of Rights and Freedoms because the bylaw discriminated against her on the basis of who she chose to marry.

The court would have struck down the bylaw as unconstitutional except that the first nation was able to justify the constitutionality of it under section 1 of the Charter of Rights and Freedoms, and the band council did that in two ways. It justified the infringement because of the socio-economic conditions on the reserve. At that time Bill C-31 had come in and the band council realized that there was no way they could accommodate a doubling of the reserve population. And the other basis of the justification is that there is a historical precedent that reserve lands are to be reserved for Indians. The court was very sympathetic to Mrs. Henderson. She wasn't given a fine. She wasn't given an imprisonment, but rather she was given a suspended sentence, because the court considered that she was being treated harshly as it was, since her family was being forced to leave the reserve.

In conclusion, under the current Indian Act, bylaws cannot be used to regulate matrimonial real property rights on reserves. If the act were amended, this committee would have to consider carefully whether bylaws would be the appropriate vehicle for bringing matrimonial real property rights to reserve lands because of the inherent limitations of bylaw-making powers in general.

These limitations would include the fact that bands would not be required to enact bylaws because enacting bylaws is entirely optional. Bylaws on matrimonial real property could never be retroactive. They only apply forward from the time that they're passed. Bylaws on matrimonial real property cannot be inconsistent with the other provisions of the Indian Act, which means that by bylaw alone, there is no way that those who are not band members are going to have a possessory interest in reserve land.

As my colleague Margaret Buist is going to speak about, there are often difficulties in enforcing band bylaws.

Thank you.

The Chair: Thank you very much.

Ms. Buist, please.

Ms. Margaret Buist: Thank you, Madam Chair.

My name is Margaret Buist. I'm a lawyer with the Department of Justice providing advice to the Department of Indian Affairs and Northern Development on legal issues related to matrimonial real property on reserves.

I'm here to provide you with information on how bylaws are being enforced and prosecuted under the Indian Act. I will also discuss the current difficulties in enforcing court orders relating to matrimonial real property on reserves. That's in relation to section 89 of the Indian Act.

First nation communities have a longstanding problem of being unable to have first nation laws prosecuted, including Indian Act bylaws and laws made under various self-government agreements and legislation such as the First Nations Land Management Act.

First nation leaders express frustration about not having band bylaws enforced in a timely and clear process. They also raise concerns that the law is being brought into disrepute for a lack of enforcement and prosecution mechanisms. Aboriginal policing units and the RCMP indicate frustration across the country with the challenges of having bylaws prosecuted.

In addition, more and more first nations are negotiating community-specific self-government arrangements, which will also replace Indian Act bylaw-making authority. Examples of such government arrangements include the Nisga'a treaty, which created entirely new first nation law-making authority and raised the question of how best to enforce and prosecute Nisga'a laws. I know you've heard an excellent presentation from Mr. Aldridge on the Nisga'a situation.

It's also costly for the police to enforce band bylaws and involves significant resources. Many aboriginal communities are remote, and policing is limited at best even for Criminal Code matters.

I refer you to a specific example under section 85.1 of the Indian Act, which is the bylaw-making power with respect to individual and family situations, that may be illustrative here in trying to grapple with matrimonial real property issues. Section 85.1 is the bylaw-making power related to intoxicants, often referred to as the "dry" bylaw with reference to first nations as dry communities. Upon a bylaw being drafted about a prohibition of intoxicants, it must be agreed to by a majority of the members of a band at a special meeting held to debate the proposal. This is a significant expenditure of band resources and time. Once the bylaw is approved, it's sent to the minister and is effective within four days. You'll note that for this type of bylaw, there's no review by or approval of the minister, such as there is under section 81 bylaws.

Once the bylaw is approved, the practicalities of enforcement become the main issue. Significant financial resources are often expended in trying to enforce and prosecute this type of bylaw, by the bands, by police, and by the court systems as well. In addition, both police and courts struggle with the drafting of the bylaws—for example, in the way intoxicants are defined.

The positive aspects of these bylaws have been reported by first nations: that because of their very existence, many members of the community simply comply with the bylaw, and enforcement is not required.

When you've considering enforcement, policing is an important aspect. You may be aware that there are many different methods of policing on first nations, including the RCMP, provincial police such as the OPP in Ontario and the SQ in Quebec, or aboriginal self-administered policing arrangements. All these different police forces police with different agreements or statutes to regulate them. They all have different structures, they have different training, and they all take a slightly different approach to enforcing bylaws. You can see from this that there's not a uniform way of enforcing bylaws across the country.

I highlight for you some of the current challenges when trying to enforce Indian Act bylaws, lack of familiarity being one of the main ones. In some cases, police officers, crown counsel, or prosecutors and judges are not familiar with the bylaws. They may not have copies of the bylaws. The laying of charges and prosecutions is therefore not consistent. Most bylaws have not been presented or tested in court. You've heard Mr. Vincent speak about one in particular that went to court, but there's very little case law in this area, so many bylaws have not received judicial interpretation.

There is often similar coverage between other statutes and the bylaws. For example, provincial statutes, as in the case of matrimonial real property or family law statutes, or the Criminal Code frequently cover the same areas, sometimes more completely than band bylaws, opening the way for legal arguments as to the correct jurisdiction for the prosecution and making it more difficult for police forces to obtain guidance as to what charge to lay and whether they should lay it under a bylaw or the Criminal Code or a provincial statute.

● (1200)

There are also complexities with respect to procedure. Bylaws are procedurally cumbersome. The usual process for prosecuting a bylaw would be a long-form information, which those of you who practise criminal law know requires court attendances, unlike simpler ticket procedures. It would be more like a criminal charge than a provincial offence such as a traffic ticket. It is a more complex and more costly procedure.

Also, the intent of most bylaws is evident, but many are not clearly drafted, again providing difficulties for enforcement by the police and in the court system. They also may have outdated penalties.

I'll just turn briefly to section 89 of the Indian Act under the issue of enforcement. It's important for you to know that section 89 is relevant when it comes to matrimonial real property. One of the limitations of band bylaws, as Mr. Vincent has said, is that they cannot be inconsistent with the rest of the Indian Act, such as provisions like section 89.

Section 89 is the section that protects the real and personal property of an Indian or band member situated on a reserve from seizure by a non-Indian or someone who is not a band member. This one section of the Indian Act highlights the different rights of Indians and band members with respect to matrimonial real property on reserve, as compared to non-Indians and those who are not band members.

Spouses who are not Indians or band members cannot enforce court orders for compensation against an Indian's or band member's property situated on reserve. So even if there is a separation and a court-ordered division of matrimonial property with an order for money instead of an order for the actual home—because remember, you can't get possession of the home—a non-Indian or someone who is not a band member may not be able to enforce that if the property is situated on reserve.

Those non-Indian and non-band-member spouses are restricted to pursuing assets off reserve, if such assets exist. This has a significant impact on non-Indian and non-band-member spouses upon separation, particularly when the parties can't reach an amicable settlement and need to go to court and get court orders and use enforcement mechanisms.

You need to be aware that there is a large and ever-growing non-Indian and non-band-member population residing on reserves in Canada. You need to be mindful of this when considering any responses to matrimonial real property that the committee may be drafting. There are therefore significant challenges presented to creating a workable enforcement mechanism for matrimonial real property on reserve in using bylaws and in considering section 89 of the Indian Act.

● (1205)

The Chair: Thank you very much.

We will now go into the round of questioning on matrimonial real property, because our other witness, Chief Strater Crowfoot, is not able to be with us at this time. Unfortunately, we won't be hearing from him on the custom allotment, which I thought was very important for this committee to hear about. So I am at your liberty now as to what to do with this time.

Hon. Sue Barnes: Madam Chair, the clerk just advised me that Chief Crowfoot is not in the city right now. I know he's coming to Ottawa tomorrow. I would like us to ascertain why he wasn't here. I think it was just a mix-up in schedule timetabling. We have no direct evidence from a band on custom allotment at this point in time, and that's absolutely crucial to have before we can write a report, because it's nearly 50% of aboriginal populations.

Could we try to get him here, maybe to come to our Thursday meeting if he's already here for something else on Wednesday? Maybe we could try that and try to get some of the other witnesses we have not been able to reach because of the mess-up in scheduling due to what happened from our first meeting forward.

Could you try to get some witnesses from any of the areas that we have missed, do a push to get them here? Because we cannot do this study without the crucial information. Our researchers can't make up stuff. There needs to be evidence on the table. I think it's absolutely crucial that we give, for whatever reason—and I have no knowledge of the reason, but—

The Chair: That's beyond our control today, because he's still in Calgary and we're here in Ottawa, so I'm just trying to salvage as much of the meeting as we can today.

Hon. Sue Barnes: So can I move that we try to get...? I'll leave it to the clerk's discretion. I'm not going to take more time from the current witnesses.

Mr. Jeremy Harrison (Desnethé—Missinippi—Churchill River, CPC): I would just agree with Madam Barnes that we should hear from Chief Crowfoot.

The Chair: Thank you.

We'll work together and try to see if we can get him in for the Thursday meeting. I agree with the Honourable Sue Barnes that custom allotment is something this committee has to hear in order to deal with this very difficult issue. We'll work together on that one, and we'll go on to the round of questioning.

Mr. Harrison.

● (1210)

Mr. Jeremy Harrison: Thank you very much, Madam Chair, and thank you very much to our witnesses for being here and for the presentations today.

I was listening quite intently, and what I took away from both of the presentations was that bylaws are not the way to go. There are a number of reasons laid out for bylaws not being the way to go, a number of legal reasons and issues with the Indian Act.

I don't want to cast aspersions, but we keep hearing what we can't do or what we shouldn't do, and we haven't really heard a lot of evidence as to what we should be doing. I would like to ask you, as the bureaucrats responsible for this and probably the most knowledgeable about the legal implications of this, if bylaws aren't the way to go within the Indian Act, or changes to the Indian Act aren't the way to go—and maybe they are, and I could have you comment on that—would you be recommending a completely new act to deal with this, or changes to the Indian Act structure to allow for bylaws to cover it?

Maybe we could have your comments on that.

Ms. Holly King (Acting Director, Women's Issues and Gender Equality, Department of Indian Affairs and Northern Development): The question you asked is the reason we're here at the committee—for you to make a recommendation on the way we should proceed.

Mr. Jeremy Harrison: I would just like to know if this has been thought about. I know the parliamentary secretary has said there have been no decisions made, and there's no draft legislation sitting anywhere. But I'm asking you, as professional people who know a great deal about this issue, would you think that potentially having a new act to deal with this new legislation would be preferable to changing the Indian Act to allow for bylaw-making authority over this issue or not?

Ms. Holly King: We've been studying this issue at the department in my directorate for six years, and we've undergone a number of processes, had focus group sessions and did research, and from our research we developed what possible options people had raised. We were sort of stuck at that point. We needed guidance to move forward on this issue. We need to consult first nations and have guidance from them on how to resolve this issue.

Mr. Jeremy Harrison: So I'm correct to understand, then, that this has been talked about for six years—there have been focus groups and there have been options—but the department's lacking in direction?

Ms. Holly King: Yes.

Mr. Jeremy Harrison: Well, that would indicate to me that the lack of direction comes from the political level, comes from the government, which is supposed to be providing direction on these issues. I have to tell you I'm quite shocked that this has been talked about for six years in the department, with focus groups and options and everything put together, yet there's no direction coming from the government.

What's been going on for the past six years with this? This is crazy. We all know this is a huge problem, and it's studied to death, yet there's never any direction coming. I find it very frustrating.

Maybe you could just comment on what some of the options are that came out of the focus groups, that came from first nations, and that the department put together.

Ms. Holly King: Those options were covered by Wendy Cornet's presentation the other day, and the document is coming. It's just in our approval system right now, so you will be receiving it shortly.

Mr. Jeremy Harrison: That is the document from Ms. Cornet's presentation regarding the options?

Ms. Holly King: Yes.

Mr. Jeremy Harrison: What type of timeframe are we looking at? I'd be very interested in seeing that.

Ms. Holly King: Approval process is...probably within a week.

Mr. Jeremy Harrison: Okay, because I think that presentation was a couple of weeks ago, if I'm not mistaken.

Ms. Buist, in her presentation, talked about the.... Referring to bylaws, I'd be interested to know how many first nations—I know Mr. Vincent in his presentation talked about one specific example—have, that you know of, put together bylaws on matrimonial property issues, in a general sense.

● (1215)

Mr. Tom Vincent: I'm not aware of the totality of them. I'm aware of two first nations that have put together matrimonial real property bylaws and submitted them to the Department of Indian Affairs, only to have them disallowed by the minister. In addition to those two, the Six Nations of the Grand River actually passed a bylaw that was judicially considered and upheld.

Mr. Jeremy Harrison: Those were disallowed because they were ultra vires to the Indian Act. That goes back to my earlier question as to how extensive the amendments to the act would have to be to allow for bands to make bylaws with respect to matrimonial property. Would this be a major change for the Indian Act?

Mr. Tom Vincent: That would be a very major change to the Indian Act, because bylaws, at present—all bylaws, for all purposes—have to be consistent with the rest of the Indian Act. Unless that were changed, there isn't going to be real power under bylaws to regulate those property rights on reserve.

Mr. Jeremy Harrison: With respect to the bylaws, I know with the taxation advisory board we have a system whereby draft bylaws or model bylaws that can be used by first nations right across the country are put together. Are there any bylaws that are seen as being model with respect to issues relating to matrimonial property? I know you've talked about this already, or touched on it, anyway. Are there any models of bylaws that the department would consider acceptable that wouldn't be disallowed by the minister?

Mr. Tom Vincent: The only one that comes to mind is the Six Nations at the Grand River. That created a prohibition against spouses of those who are not band members.

The Chair: Thank you, Mr. Harrison.

Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary: I shall try to follow in the same footsteps as Jeremy. This is the crux of the problem. We have known for at least ten years or more that the Indian Act is obsolete and should have been junked a long time ago. A Minister for Indian Affairs—I do not remember who it was—even said so in an interview to the newspaper *Le Devoir*.

I have heard Ms. Buist two or three times in this Committee. We have never received any answer. The only answer given by Mr. Vincent was that by-laws were *ultra vires*. This is nothing new. This is the first thing they look at when by-laws are submitted. And when they are confirmed to be *ultra vires* everybody is happy and write a letter to Native leaders saying that their by-laws are *ultra vires*.

I regret to say that you are not helping this Committee. We are asking you to help us find a solution to those problems of which you should be cognizant. If you cannot, go back to your studies because it doesn't make any sense. You should be able to tell us that we should do such or such a thing, to eliminate such or such an element in the Indian Act. You are afraid of your own shadow and afraid to speak. I strongly believe that you know the answer. What is the point of having people coming to this Committee if they have nothing to say or if they can only repeat the kind of trivialities that we have been hearing for so many years?

You know that this is the crux of the problem. Do not tell me that you do not know the answer. You are saying that it has to be done through by-laws, but they are not acceptable under the Indian Act because of clause 81. We shall never be able to find a solution if section 81 is not amended or abolished and replaced by another clause.

Indian ladies came to tell us about this issue. This is blocking everything. You are the experts but you have no solutions to offer.

● (1220)

[*English*]

The Chair: Excuse me, Mr. Cleary.

Hon. Sue Barnes: On a point of order, I'm just going to clarify. These are not policy-makers at the table; these are departmental officials. I just find it a little unfair. There have been requests by the clerk to get the witnesses. I am going to make it a point of order and ask the chair whether or not this is the way to treat departmental officials.

The Chair: I would like to add that we try to be very respectful to all the witnesses, no matter where they come from. I want to remind the committee members that we already found out from the last Parliament that people want the solutions to come from themselves.

If you look in the blues of the government's process, they did not want solutions to come from the Department of Indian Affairs; they wanted the solutions to come from the people.

So I think we should be fair to the witnesses and offer the same respect to them as we do to others.

Mr. Bellavance.

[*Translation*]

Mr. André Bellavance (Richmond—Arthabaska, BQ): Madam Chair, there is nothing disrespectful in the statements made by my colleague Bernard Cleary. I find it unacceptable that the Parliamentary Secretary for the Minister interrupts this way.

These witnesses are representing the Canadian government. We listened to many lawyers during our study of the matter but we are getting nowhere. Why should it be disrespectful to say so? There was no personal attack in this statement. Our witnesses should clearly understand that the message is directed at the government, at the Department of Justice and the Department of Indian Affairs. I do not think that our witnesses have been offended and I would like us to continue with our questioning.

Ms. Barnes is constantly mentioning the delays that occurred. She has just proven that it is she that is very often the source the problem. I would like us to continue and stop interrupting my colleague.

[*English*]

The Chair: Mr. Cleary, please.

[*Translation*]

Mr. Bernard Cleary: We should understand that this is not a social event and that our job here is not to indulge in friendly chit-chats. We are here as members of a committee trying to find some solutions. I am sorry, but the day when we stop finding solutions for fear of offending Tom, Dick or Harry, is the day I will look for another job. I have better things to do than talking about the weather.

The departmental officials shouldn't be too sensitive because in the final analysis they're working for the people we are representing. That being said, the idea here is not to destroy careers. I know that if the government was asking those people to do certain things, they would do them.

Of course—and it is unfortunate—you are the ones who are blamed, because the government doesn't let you offer solutions. So you cannot offer any. Then why have these meetings with the persons the more cognizant with these issues if their suggestions are not taken into account? The justification given is that First Nation communities want their own solutions and this is true, but they want the help of Indian Affairs or the Department of Justice. They know that they do not have all the information required. They need help. It is not disrespectful to work with people and give them answers. But it is disrespectful to work with people and do everything to prevent progress. This is not the right thing to do. We are involved in an important process. We have invested a large amount of time in it but I can tell you that up to now most of the time that I have spent here has been entirely wasted. As it is what I am supposed to do, I am going to ask you a question.

As you are the people the best equipped to do so, could you rapidly submit to us some proposals that we could study and take under serious consideration? Thank you.

● (1225)

[*English*]

The Chair: You have only one minute to answer the question.

Ms. Holly King: I'll answer. Thank you.

Over the last six years, in all of our processes, every government that came in developed a different process, but we've taken the information and learned something new through each process.

A range of options has been developed. Some believe that the federal government has the responsibility to address this issue by adopting federal legislation on matrimonial real property applicable to all first nations. For instance, federal legislation could incorporate provincial and territorial matrimonial real property laws on reserve, or provide options to first nations to create their own laws on the issue. Federal legislation could also provide a combination of both, meaning that provincial and territorial real property laws could apply on reserve lands until first nations developed their own matrimonial real property.

At the other end of the spectrum, some argue that the only solution is recognition of the first nation inherent right to deal with matters related to family law, including matrimonial real property. They view any legislative response as an infringement on the aboriginal right to self-government.

The variety of options to address the on-reserve matrimonial real property issue was no doubt reflected in some of the testimony you heard from witnesses before this committee. We need direction on how to proceed. The issue is very complex. It involves a section 89 enforcement, and we need direction on the major policy issues. That's why we're here before the committee.

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

We will now go to the government, with Roger Valley and Sue Barnes splitting the time.

Mr. Roger Valley (Kenora, Lib.): Thank you, Madam Chair.

Thanks to the witnesses for coming today. You have seen us not at our best.

I want to clarify for the record that if some members feel they're wasting their time, I am not here to waste my time. I'm here to get things done.

We've heard how other members are shocked that things haven't moved forward. We provided a timetable, and we provided an agenda to move through this issue. We have constantly been derailed. We have been talking about other important issues, but we had a plan to deal with this issue, and it keeps getting sidestepped. Even last week, we brought in witnesses to the cost of many thousands of dollars, and we were not allowed to hear them because of a ruling by the chair.

On this side of the table, we are trying to move things forward.

I would like to ask Ms. King this. You mentioned that you're developing a plan and everything else. How much weight or how much information do you gather on the areas where it's working well? I think Mr. Vincent mentioned Sucker Creek. Do you look at the areas where things are working? How do you value what is working in the communities when we look forward to how we're going to put something together?

Ms. Holly King: We don't have much knowledge on what's happening in the communities right now, and that's why we had hoped to hear more witness testimony during this committee.

Because the bylaws have been disallowed, we don't know if they're exercising their inherent right within their jurisdiction to cover it. We only know that they haven't been brought before the courts. We don't know if it has been implemented in the first nations community or how it is working.

Mr. Roger Valley: That's one of the things we struggle with in this minority government. We know that nothing is going to go through unless everyone agrees. That's why we need to listen to the witnesses and we need to pay attention to the agenda that was laid out. We need to focus on that again.

Unfortunately, we've been dealing strictly on political matters, arguing topics and events, and grandstanding to a large part. That's why some members feel they haven't accomplished a thing here.

I think that we need to hear more witnesses. Our job is not done. I think that's very evident by some of the things that have happened in the last little while. I would urge the chair to try to get more time for this committee to hear witnesses.

We have had several what I would call very unproductive meetings due to discussions by the members on all sides. I think it's important that we continue this study and do it right.

If I have any time left, I will allow Mrs. Barnes to use my time, please.

● (1230)

The Chair: Ms. Barnes.

Hon. Sue Barnes: I only have a technical question that I think needs to be on the record. Maybe Mr. Vincent could answer it.

Can band bylaws passed under the authority of the Indian Act be reviewed under the Canadian Human Rights Act?

Mr. Tom Vincent: No, band bylaws cannot be reviewed under the Canadian Human Rights Act. What would be more likely to happen is that under a band bylaw or band housing policy, a band council administration might attempt to have it reviewed under the Canadian Human Rights Act, but section 67 of the Canadian Human Rights Act provides an exemption for decisions that are taken pursuant to the Indian Act.

It means that when somebody alleges there has been discrimination by reason of sex, sexual orientation, marital status, or family status, if they bring an application before the Canadian Human Rights Tribunal, the tribunal is without a remedy. That actually occurred.

Hon. Sue Barnes: I know what happens with section 67. We've covered that before.

Mr. Vincent, you're familiar with the Sucker Creek First Nation and their matrimonial system. They put in a bylaw that was rejected. We are under the impression that they are still trying to operate. I don't know if it is correct. What were the key elements of the bylaw that they put in place to manage their own matrimonial real property on reserve?

Mr. Tom Vincent: I think that the key features of the Sucker Creek draft bylaw could be of great interest to this committee, because it really shows how some of the first nations are devising their own systems.

It is important to know that the Sucker Creek bylaw was not put into force because it was disallowed. Had it not been disallowed, and if a bylaw did have the power, one of the things Sucker Creek would have done would be to encourage people to enter into matrimonial contracts. The bylaw would provide for the freedom of a contract for people to deal with the division of property upon entering a spousal relationship or in a separation agreement upon breakdown.

Another key feature would be mediation as a compulsory component to that. For parties who are unable to reach agreement themselves, then the band council perceives that it has a role to provide skilled and qualified mediators to bring those parties together.

Where mediation fails, Sucker Creek would then provide access to the ordinary courts of Ontario. Sucker Creek would respect the jurisdiction of the courts off reserve to deal with property off reserve, which they normally have. Sucker Creek would also invite the ordinary courts of Ontario to apply the general laws of application in Ontario to lands on reserve and would allow remedies such as exclusive interim possession, partition, and sale.

An interesting feature of the Sucker Creek bylaw is that it would provide equality to married, common-law, and same-sex spouses. It wouldn't differentiate among them.

Hon. Sue Barnes: Ms. Buist, you've shown us subsection 89(1)'s shortcomings, but are there any other practical barriers to enforcing orders for compensation on reserves that you're aware of from the canvass?

Ms. Margaret Buist: Yes. There are very much practical barriers —primarily access to the legal system at all. As I mentioned, there are a lot of remote communities where there's really no access to a family court system to deal with these issues, or very limited access.

There is a nationwide problem in terms of lack of legal aid assistance for people of low income who live on reserve to obtain family law lawyers to help them, or lack of financial resources in general to deal with these issues. As many of you know who used to practise law, to hire a lawyer to deal with family law issues is a very expensive process.

Those are some practical limitations that exist, as well as section 89.

Hon. Sue Barnes: Holly, I know the department was working on some plain-language matrimonial material to distribute to first nations about rights. Is that material ready, or close to being ready?

Ms. Holly King: The plainer-language document we have developed is actually in printing now. We have other documents that we've prepared over the years, which we've been using when we go out engaging first nations communities on this subject. We have maybe four. We have Wendy's discussion paper and the plain language document, and we should be able to provide the committee with this within a couple of weeks.

● (1235)

Hon. Sue Barnes: Thank you very much.

Thank you, Madam Chair.

The Chair: You actually got five or six questions in there.

Mr. Prentice, please.

Mr. Jim Prentice: I would like to follow up on a couple of the questions relative to what recommendations you've put forward to this point. I appreciate the committee is studying this, and some of the other committee members have commented today on the fact that we haven't made any progress over the last ten years in moving things forward.

I'm trying to understand. Have you or some of the senior departmental officials made recommendations to the minister on this issue in the past?

Ms. Margaret Buist: You have to remember we're the lawyers to the Department of Indian Affairs, so we don't make recommendations. It would be officials from within the Department of Indian Affairs who would make recommendations to the minister. We simply provide legal advice. I shouldn't say "simply", but we provide legal advice. We would be there during the discussions to provide legal advice.

I can turn over the question to Ms. King, in terms of what's happened within DIAND on the recommendations.

Mr. Jim Prentice: Before we go to Ms. King, let me ask you, Ms. Buist, whether you have given legal advice to the minister on how to proceed with this.

Ms. Margaret Buist: We've given lots of legal advice with respect to matrimonial real property, but I'm bound by solicitor and client privilege not to tell you what it is, or who it's given to, or anything like that. I simply can't do that.

Mr. Jim Prentice: Perhaps, Ms. King, you could indicate whether you have given advice to the minister on what to do about this problem, this issue.

Ms. Holly King: We had taken the spectrum of options to our senior policy committee, along with different processes, and the recommendation was to refer the question to this committee to be able to hear witnesses and get direction on the bigger policy questions.

Mr. Jim Prentice: I'm just trying to understand how this has all worked and how it's ended up here. The minister is the minister responsible for the executive branch of the Government of Canada, responsible for this file. Why has this matter been sent back to this committee to beaver away on? Why has it not been put in front of the minister to make some decisions, to give you people political direction and to get on with the important task of legislative reform?

Have you provided the minister with alternative options that would show a way forward to resolve this issue?

Ms. Margaret Buist: While Ms. King is looking for something, perhaps I can assist. About a couple of weeks ago I was here and was asked, when I was a witness on my own, to provide you with policy options. I'm bound by solicitor-client privilege and can't do that, so DIAND officials went back and, as Ms. King mentioned, thought it would be very helpful to give you the policy options. It's working through their process, and they should have it approved within a week to give you the policy options that have been discussed within DIAND. It's not for lack of desire to give it to you; it's that I'm not able to. So they are trying their best to get it to you as quickly as possible.

The Chair: I would just add that I think in the last Parliament we were given very clear direction from aboriginal people that they offer the solutions to their problems and that the minister and the Prime Minister had better start listening to the people of Canada. And that is a new direction that I've seen in this new Parliament, if that helps to answer your question.

Mr. Jim Prentice: That's fair, but you still have to have action from the executive branch of government. So it is the minister who should be consulting with aboriginal Canadians and with the leadership of aboriginal organizations and taking steps forward. All this committee can do is talk about the recommendations that should be in front of the minister, frankly, not in front of the committee.

I mean no disrespect to the witnesses whatsoever. They're clearly struggling for political direction on a way forward. Well, that can't come from this committee. It has to come from the minister in consultation with aboriginal Canadians.

Do you have any comments on that?

● (1240)

Ms. Holly King: In my opinion, first nations have a lot on their plates right now, and we need to narrow the issues as far as what we're going to take to them to seek advice on. And I think the minister, in his letter to the Chair, is seeking the advice of this committee on how the federal crown can best address this issue as it affects married, common-law, and same-sex couples on reserve. Because of the complexity of matrimonial property, I think he sought your advice on how we can proceed.

The Chair: We'll now go on to Sue Barnes and then on to Mr. André Bellavance.

Hon. Sue Barnes: Thank you very much.

I'll just remind everyone that we're in a minority government, and that for any legislation to make it through there has to be some agreement around the table that first nations, in the last Parliament, did not want legislation imposed on them. We have all received one full binder that was put together, and I wonder how many people, when I hear some of these questions, have read their binders, because I hear questions all the time that are answered in the binder.

Thank you very much. I will recognize that Mr. Bellavance read his binder. So thank you.

The Senate committee spent 18 months crossing the country, hearing from individuals that there is a huge problem. We all know that. It was determined that we would not go and canvass about what the problem is. We all know what the problem is. We've had fewer than ten meetings on this right now. What we're looking for are people to bring us, from different backgrounds in different systems that exist across this country, their experts.

Bonnie Leonard was here the other day to tell us about one thing that she thought could work in B.C. We didn't get a chance to spend a half hour questioning her, but we did do that informally afterwards, so we have that information now.

We will need to decide and give to our researchers some of our ideas on how this could potentially happen. But I think one of the most important things we have to consider here as a committee, and I'm going to lay it on the table while it is televised, is whether—we've had conflicting evidence—it's an immediate imposition of a piece of legislation. It just sounds to me, from everything I've heard, that the most likely core of that, if you were to do it, would be federal-provincial.

We already know from prior Parliaments that that is not the approach that first nations would like, and we heard it here in the testimony both from the AFN and NWAC, saying they want a collaborative approach.

Maybe one of the ideas that needs to be canvassed is whether we saw it off in the middle here. I can assure this committee that there's no legislation written that I'm aware of as parliamentary secretary. That has been told to me repeatedly, and I also know that I've been heavily involved in making sure that members of this committee, quite unusually, received every piece of information that I could put together to narrow it down to the focused areas. I spent a lot of time with the department officials reaching out and figuring out who would best provide the best opinion across the country. Given the number of days that this committee study was reduced—not because I wanted it that way, but because in a minority government there were other days that the committee, in its wisdom, decided to allocate to other studies—we now have to do some narrowing.

One of the most fundamental issues is whether we set ourselves up for another clash or whether we do it collaboratively. Maybe one of the issues that we look at, even if we go as a committee to imposing legislation that may have a number of different solutions as part of it—for instance, a repeal of section 67—that might be something....

Yes? Point of order?

[*Translation*]

Mr. André Bellavance: Is this a plea by the Parliamentary Secretary or is she questioning the witnesses? What is it? I am hearing a plea from the Parliamentary Secretary who is explaining in details all the events that occurred in this Committee.

● (1245)

[*English*]

Hon. Sue Barnes: That's not a point of order.

[*Translation*]

Mr. André Bellavance: Yes, this is a point of order, because our witnesses are here to answer our questions.

[*English*]

Hon. Sue Barnes: I'm prefacing my questions, and I would like to continue. I would like to take my time.

The Chair: We are speaking to what the mandate of the committee is because there seem to be questions on where the options should be coming from.

I'm giving her the same courtesy I give all of you to use the time limit. I've been very generous to your party in using your time to get your point across and not ask too many questions.

Hon. Sue Barnes: The departmental official can acknowledge whether this is correct or not, but Mr. Prentice made the point of asking why a minister is throwing in a piece of legislation. I'm making the point that we're in a minority government. We have partners in the first nations community who have to be able to accept this. There has to be some consultation on any piece.

On one of the options, even if there were immediate legislation there would be a time lag. This time lag could potentially be utilized by first nations to do a number of things, whether it's going in and more actively pursuing their matrimonial requirements under the First Nations Land Management Act; doing their own custom work and making that more public so people can do it; or removing section 67 and in essence giving a statutory tool to aboriginal organizations like NWAC or individual first nations people who feel aggrieved to use the charter on the basis of equality.

Holly King, one of the things I'll put to you is to confirm whether or not there is sitting legislation there. The second thing I'll put to you, because this seems to take up a lot of conspiracy theory ideas on the other side here, is whether or not this time lag.... One of the options of having the acceptance by first nations of a piece of legislation is whether or not it revolves around federal-provincial, something we dream up in this committee, or something novel an individual like Bonnie Leonard comes in with that the department has never even heard about.

Ms. Holly King: We have no legislation.

The Chair: Very briefly, Ms. King.

Ms. Holly King: Any solutions to matrimonial real property will require a collaborate approach between first nations and government.

The Chair: Thank you very much.

We'll now go to Mr. Bellavance.

[*Translation*]

Mr. André Bellavance: Thank you, Madam Chair.

As I was saying earlier after the intervention by my colleague Bernard Cleary, we have heard from many lawyers and legal experts since the beginning of our discussions on matrimonial real property. It is not a sin to be a lawyer or a legal expert. My spouse is a lawyer. Of course, it was not an insult, but I sense there is a legal vacuum. This legal vacuum has not been filled yet. It must be difficult for lawyers or legal experts to find themselves in that kind of situation.

When Ms. Buist appeared for the first time, I told her that there were several laws in conflict with each other: the Charter, the Constitution Act, provincial laws and the Indian Act. There is no preponderance. There is no simple solution to the issue of matrimonial real property.

There are several conflicting interests: the interests of the government, obviously, and the interests of band councils. I am mostly concerned with the interests of the victims. We have been talking about it for so long but we have not yet been able to solve this problem.

Ms. King, you said earlier that you were waiting for some direction. Are you waiting for the instructions from our Committee or from the government? This is my first question.

[*English*]

Ms. Holly King: The minister wrote to the committee seeking your advice, so we're waiting for the advice to be brought back. I guess your report's due by June 1, so we're waiting for that to proceed, and how the minister will decide—what recommendations you'll be making.

● (1250)

[*Translation*]

Mr. André Bellavance: I shall come back to the lawyers and legal experts.

If you are waiting for some direction, we are expecting some information from you. We would like you to explain this legal vacuum and how we could fill it. We haven't yet obtained any answers to these questions.

[*English*]

Ms. Margaret Buist: Our role here today, as it was in my previous appearance for the Department of Justice, is to provide you with some education about the issue, to explain to you the pros and cons of various legal aspects of matrimonial real property. It's not to provide you with the answers. We are not the legal advisers to the committee; we are the legal advisers to the Department of Indian Affairs.

We bring our expertise to you today to explain to you the law and problems we have encountered with the law, like section 89, like the limitations on bylaws, and like the consideration the committee has to give to the charter and the Constitution. That's our role here, to educate you on the law that's relevant to the issue of matrimonial real property.

[*Translation*]

Mr. André Bellavance: I understand that you are the legal counsels of the Department of Indian Affairs but you are here as witnesses to inform us about possible options. What options have you suggested to the Department of Indian Affairs concerning matrimonial real property?

[*English*]

Ms. Margaret Buist: Once again, I cannot give you the advice we give to the Department of Indian Affairs because we're bound by solicitor-client privilege. All I can do for you is describe to you the issues we've put before you: the charter, the Constitution, the limitations on bylaws, and issues with respect to the First Nations Land Management Act and self-government agreements. Those are all the things we have looked at, all the possibilities that exist in terms of dealing with matrimonial real property, including legislation.

For example, if you're going to consider legislation, my information to you was to be very careful that it comply with the charter and with the Constitution. If you ask me how, as you did, my answer is that we don't have the answers because the courts have not adjudicated on that. All we know is that the solutions must take those into account.

[*Translation*]

Mr. André Bellavance: If I understand correctly, the Minister has received some advice on this issue. Maybe our Committee should hear the Minister for Indian Affairs to know what he did with the advice he has received concerning matrimonial real property. It might save us time.

That's all.

[*English*]

The Chair: Thank you very much.

There seems to be some confusion about what the mandate of committees is. My experience with previous committees is that we took all the witnesses' interventions and as a committee actually wrote a report with recommendations on how we wanted the government to move forward on an issue. We should have an opportunity in this committee to do a real report on this very important topic. We've heard different options from very many different witnesses, and in the next order of committee business we can have a chance to discuss what we would like included in the report.

Therefore, I'd like to thank the witnesses for coming before us on this very important topic, again, and offering....

Mr. Bellavance.

[*Translation*]

Mr. André Bellavance: Excuse me, Madam Chair, but have we finished working with the witnesses?

[*English*]

The Chair: Your five minutes is up.

[*Translation*]

Mr. André Bellavance: But the Committee has finished working with the witnesses.

I just would like an amendment to our agenda. My colleague would like to move a motion. I wish to ask for the agreement of the Committee to amend our agenda.

[*English*]

The Chair: We are going into committee business, so we can deal with it then.

I just want to take this time to thank the witnesses for coming before us. We will add your presentations to the store of data we have now on this topic. Again, thank you.

We will suspend for just a minute to get ready for the in camera committee business.

[*Proceedings continue in camera*]

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