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Chair

Mr. Chris Warkentin

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● (0850)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, I call this meeting to order.

This is the 70th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Today we are continuing our study of Bill C-428. We have two witnesses with us today, one via video conference and the other, Mr. Chartrand, who is of course here in the room.

We'll begin with Chief Perry Bellegarde. Thanks so much for being here. We appreciate your willingness to join us and certainly your time. We'll turn it over to you to begin with. We'll hear your opening statement and then hear the opening statement by Mr. Chartrand in the room. Then we'll begin with questions.

Chief Perry Bellegarde (Chief, Federation of Saskatchewan Indian Nations): Thank you very much, Mr. Chair.

Good morning. Today I'm appearing by video conference as the Chief of the Federation of Saskatchewan Indian Nations, as the Saskatchewan regional chief of the Assembly of First Nations, for which I carry the national portfolio for treaties. I want to thank you and the Standing Committee on Aboriginal Affairs and Northern Development for accommodating my request to provide evidence.

Our federation here in Saskatchewan represents 74 first nations. I always take the time to acknowledge the Denesuline; the Dakota, Lakota, and Nakota tribes; the Swampy Cree, the Woodland Cree, and the Plains Cree; and Anishinabek and the Saulteaux Nakawe nations. Our federation is committed to honouring the spirit and intent of treaty as well as the promotion, protection, and implementation of the treaty promises made more than a century ago.

While I'm currently chief of the FSIN and Saskatchewan regional chief for the Assembly of First Nations, I was also raised on the Little Black Bear First Nation in the Treaty 4 territory, a treaty territory that spans southern Saskatchewan, southwestern Manitoba, and a small piece of southern Alberta, of approximately 75,000 square miles. I have been an elected leader at all levels of first nations organizations, from FSIN chief to the AFN regional chief, tribal council representative, assistant tribal council representative, as well as being the chief and councillor of the Little Black Bear First Nation.

At the same time it has been my honour to have learned from more than 60 traditional knowledge keepers and elders, both men and women, from throughout the treaty nations of Saskatchewan and other parts of what we now call Canada. Those elders and knowledge keepers taught me about the spirit and intent of treaty.

Full respect and implementation of aboriginal treaty rights by governments and Canada is essential in order to alter the daily-lived experience of our people who reside on reserves and in the urban centres of Canada.The urgent need for Canada to demonstrate genuine respect and long-term commitment in keeping with the 2012 crown-first nations gathering and the 2013 meeting between the Prime Minister and first nations leaders remains.

Full honour and implementation of our treaties is crucial to the evolution of Canada and the principle of federalism. Cooperation and harmony within the Canadian federation is not generated by closing off discussion on significant undertakings, such as by unilaterally amending the Indian Act. Cooperative and harmonious relationships cannot be achieved by devaluing treaties or by unilateral government actions. What's needed is a comprehensive process supported and committed to by government with full and inclusive partnerships between first nations and government.

We all agree that we want to move beyond the Indian Act and the colonialistic controls of the Indian Act; there's no question about that. The important thing to keep in mind is the process that we use to get outside of the Indian Act. That process must be driven by first nations people, not a private member's bill. The process must have the full political and financial support of the government over the long term, a process that builds upon the Prime Minister's commitment from the 2012 crown-first nations gathering and from the January 11, 2013 meeting. The process of creating a private member's bill does not include adequate resources for consultation and accommodation by first nations people.

If the government were serious about amending the Indian Act, it would not be done through a private member's bill. It would ensure that were enough resources for extensive consultation with first nations people, both on and off reserve. This process is not respectful. This is not in keeping with the duty to consult and accommodate and does not reflect the honour of the crown, nor does it respect the principle and practice of free, prior, and informed consent as reinforced in the UN Declaration of the Rights of Indigenous Peoples, which the Government of Canada endorsed in 2010.

Our treaties are international in nature, and I always say that treaties trump policy. Policy does not trump treaties. In 1876 we were given an Indian Act. It was not a treaty implementation act, it was an Indian Act. At issue here is that there is nothing in place to give legal effect to those sacred treaties that we have, which we entered into with the crown, nation to nation.

As indigenous peoples, a lot of us have even become so colonialized as to think that our rights come from the Indian Act, to the extent that some of us still call our Indian status cards treaty cards.

● (0855)

Given the Prime Minister's commitment on January 11 to a high-level mechanism and a process to look at treaty implementation, we felt there was an opportunity to move beyond the Indian Act towards a treaty implementation act, to give legal effect to our international treaties, and to implement section 35, which recognizes and affirms treaty rights in Canada's own constitution.

As indigenous peoples, we have the inherent right to self-determination with the ability to enter into treaty relationships with the crown and with other indigenous nations. We exercise that right, and because we shared the land and resources with the newcomers to Turtle Island, we now also have treaty rights. Under that inherent right to self-determination, we have the ability to create our own laws under our own jurisdiction. We don't need bylaws under the Indian Act. All we need are our own laws to be respected and recognized.

The question I have for this committee is this. If this Indian Act is done away with tomorrow morning, would that mean that we've done away with our inherent rights? Does that mean we've done away with our treaty rights? Does that mean the federal fiduciary or crown trust obligation is gone? The answer is no, of course not. We will always have our inherent and treaty rights. They come from a sacred covenant with the Creator and they will be there as long as the sun shines, the rivers flow, and the grass grows. My point is that we are indigenous peoples. We have our own land, own laws, our own customs, traditions, languages, and are our own identifiable people with our own identifiable form of government. Because we are indigenous peoples, we have the ability to exercise an inherent right to self-determination based upon our jurisdiction. Because of that, our chiefs entered into that treaty relationship with the crown. They exercised that inherent right and made that international treaty. Unfortunately, a treaty implementation act did not follow.

The Indian Act was put in place in 1876. The private member's bill is not the way out of the Indian Act. The private member's bill will not facilitate a treaty implementation act. This does nothing for Canada to implement its own constitution. Again, we all agree with getting out of the Indian Act, but it's the process. What I'm here to talk about is the adequate process, one that honours the duty to consult and accommodate by the crown. If that's not in place, we can't support any of this.

I think you should scrap the bill and start over. If your objective was to start a dialogue, Rob, you've done a great job of that. I commend you for that. Your objective has been met. This is a dialogue that is not fully supported by government. I believe that if it were, there would be a meaningful consultation process involved that would have ensured a fully financed, long-term, sustainable process for treaty implementation, fully supported by cabinet and the Prime Minister's Office.

That's my formal statement right now, honourable committee. I look forward to some questions later on.

● (0900)

The Chair: Thank you, Chief.

We'll now turn to Mr. Chartrand. Thank you so much for being here. We appreciate your willingness to join us. We'll turn it over to you for the next little bit for your opening statement.

Mr. Paul Chartrand (Professor of Law (retired), As an Individual): Thank you, Mr. Chairman. I will begin by offering my greetings to the committee. Thank you for inviting me to appear.

Briefly, by way of introduction, I am a retired professor of law, which I taught for a few decades, mostly in Canada and Australia. I've focused on law and policy relating to indigenous peoples.

Because of some of the comments that were made, I should also add that I was one of the commissioners appointed by Prime Minister Mulroney to Canada's Royal Commission on Aboriginal Peoples in 1996, among other appointments.

I'm here today to make my own professional observations about Bill C-428, not as a representative of anyone. My approach is to make some recommendations based on what I view as good law and good policy based on principles of democracy and constitutional values in Canada.

I offer the following.

The preamble of Bill C-428 characterizes the act as an outdated colonial statute. Is amendment the best way to deal with that? The royal commission's final report in 1996 made some alternative suggestions with regard to amending the Indian Act, but no government since then has undertaken those alternative means, which would by and large involve a negotiation of treaties.

Let me say by way of opening comment that some take the view that amendments to the act involve an attempt to make a silk purse out of a sow's ears, as it were. Given the politically contentious nature of any amendments to the Indian Act, one might add to the image by suggesting the knitting of a silk purse is to take place while tiptoeing through a minefield.

The Indian Act is, indeed, an archaic law that has been imposed upon Indians since 1876, for the purpose of having Ottawa bureaucrats and politicians run the affairs of Indians on reserves. It must be done away with, one way or another. But in Canada you cannot change the state of affairs under which people have been administered for many generations in accordance with the idea that motivated the Indian Act in the first place; that is, that those Ottawa people know better than Indians how to run their own affairs at home. The Indian Act also involves treaty rights because of section 88, which deals with the application of provincial laws and its treaty exemptions.

Clause 2 of the bill, of course, requires that a minister report annually to this committee. My first recommendation is a policy that no amendment to the act is to be proposed or introduced in Parliament without first conducting proper consultations with first nations representatives, and that all bills be drafted in consultation with them.

This approach would tend to promote the democratic principle that laws ought not to be passed without the agreement of those who are to bear the burdens or reap the benefits of the legislation. This approach would at least partly remedy the lack of equitable representation and participation of first nations in Canada's Parliament and government.

My second point is this. Amendments increase the complexity of the law applicable to Indians and lands reserved for the Indians. An annotated publication of the act runs well over 400 pages. Amendments are being made all the time, under various bills, some with obscure titles such as budget implementation acts, and other omnibus bills. These types of bills, which by the way do nothing to promote democratic consideration of proposed legislation, increase the complexity.

There are costs of all kinds worked against first nation interests in such a situation. I note in this regard, that Bill C-45, the recent omnibus bill, also provided for an amendment to the act. That amendment called for the involvement of the minister in the administration of Indian Affairs on a reserve. The interested reader of Bill C-428 will not see that particular amendment.

● (0905)

I will refer to the title of the act. I mentioned that it is a good feature of this piece of legislation that it appropriately identifies the contents of the bill. That's unlike legislation that has recently been passed whose titles obscure the contents of the legislation rather than reveal it. The most egregious example I can think of was known as Bill C-3, which was entitled the gender equity in Indian registration act. That became law in January of 2001. The content of that bill was to deal with the right of individuals to equality before and under the law without discrimination on the basis of sex, as provided in section 15 of the charter. There's no such thing as gender equity in the Constitution.

I will turn now to consider the objectives of the act. What is the mischief to be remedied by the proposed amendments in Bill C-428? The first or preambular statement asserts implicitly that Canada's first nations ought not to be “subjected to differential treatment”. This offends the constitutional recognition and affirmation of the distinct collective rights of Indians as aboriginal peoples who are entitled to differential treatment. Differential treatment is demanded by the law of the Constitution. The easily misunderstood concept of equality of citizenship rights, to which all first nations or Indian persons are entitled, is easily confused, in the public mind and in this preambular statement, with the constitutionally mandated treaty and aboriginal rights, which are collective in nature and demand differential treatment.

My recommendation is that a new, substantive, and not a preambular provision be inserted in the bill that clearly identifies the purposes or objectives of the act. This would go a long way toward assisting in judicial or other interpretation of the legislation. I note that section 3 of the Indian Act—and this is an important provision of the Act—reads that “This Act shall be administered by the Minister, who shall be the superintendent general of Indian Affairs”. Without removing or altering that provision, there might be some difficulties interpreting any sort of an amendment that proposes to do things pursuant to the objectives identified in the preamble.

I'll go now to mention the repeal of sections 32 and 33, which have to do with the outlawing of free trade. If you're not familiar with the history of this provision, I would respectfully urge the members of the committee to look at that, which as I understand began in Manitoba. The Dakota farmers were outdoing the local farmers in the Brandon area and they didn't like that. They contacted their friends in Ottawa and had free trade of agricultural products from the reserve outlawed by these particular provisions.

I would cite the literature of Professor Sarah Carter, who has written a book and some articles that would provide you with an excellent historical background of the way in which this has come about. You will know, honourable members, that section 32 has not been enforced for quite a long time. An order in council from 2010 has exempted all bands on the prairies from this operation. This was a prairie provision.

My modest suggestion in regard to the repeal of these provisions is that you can't dispute that the operation of these provisions would have worked to the economic disadvantage to prairie Indian farmers. The act has contributed to a legacy of poverty and marginalization that forms part of a national mythology of racist assumptions about Indians.

Is it good enough to shut the door on this bad legacy? I suggest that when we shut that door we open another door. The repeal of these provisions is an invitation to you, to the federal government, to set up remedial programs to boost Indian agriculture to make amends. Experts in the field would be able to advise you on the details of such programs, but certainly, you will agree that the objective is one that's recommended by a genuine sense of doing the right thing today.

● (0910)

I refer now to the wills and estates provision, which is clause 7 of the bill and which proposes the repeal of sections 42 to 47 of the Indian Act.

By the way, I suggest that some cleaning-up of the drafting be done. The drafting, in respect to clauses 5 and 7, could be done a lot better rather than throwing headings and substantive provisions all in one basket and saying we're repealing all of that. It's better to clean it up and say, “We repeal the heading, we repeal section 32, we repeal section 33”, rather than saying “The heading and blah, blah, blah...”, which can be confusing. We don't need to add unnecessarily to the complexity, and so a little better drafting can help.

The core issue in respect to the proposed repeal of these sections, which have to do with Indian wills and estates, has been considered by the Supreme Court of Canada. Again, the case of Canard from the Sagkeeng First Nation in Manitoba in 1976 is a leading authority in this area. With the repeal of these provisions at first blush, it appears that the wills of Indians resident on reserves would now be governed by provincial laws of general application rather than federal laws under the Indian Act. This is the result of the constitutional division of powers as well as the operation of section 88 of the Indian Act.

It would seem at first blush that this type of wills and succession legislation necessarily involves family relations and, therefore, the traditional values of first nations, their customs and practices. If wills and succession legislation, which also by the way affects interests in reserve lands, is part of first nation law, say Cree family law, then there's an important implication of the repeal of sections 42 to 47.

The question is whether these provincial laws of general application to Indian reserve residents apply, and if so, if they are constitutionally valid, notwithstanding the potential infringement of the treaty or aboriginal rights of the Cree people. I note, by the way, that the current government has also introduced other legislation dealing with family homes, and matrimonial interests and rights on reserve, and the same question appears there. So one has to be very careful when scrutinizing the implications of this sort of legislation, otherwise you're inviting litigation, or challenging it for its constitutional validity.

I mention, for the benefit of the members of the committee, that Cree law, and Cree family law in particular, has long been recognized as good law in Canada, I cite the Connolly and Woolrich case of 1867, which is a reported decision.

In regard to the comments I'm making, I note also that the modern treaties being negotiated with first nations include provisions recognizing the authority of these first nations to make laws in respect to particular aspects of family law. For example, the Maa-nulth Treaty of 2007 includes the power to make laws respecting adoption, child custody, child care, social development, and solemnization of marriages of Maa-nulth citizens.

Clause 6 proposes an amendment to current section 36 regarding special reserves and reserve lands. This is a very difficult topic, both as a matter of statutory interpretation and constitutional analysis and as a political issue. It is not all that easy to discern the objective of this particular provision. Again, it would be helpful if you had, as I suggested, some provision to better identify the objective of the legislation.

● (0915)

As I understand the text of the proposed amendment, it would have a prospective effect of only retaining the status of reserved lands that are now in the category of special reserves. By necessary implication, all reserve lands created in the future would have to be lands to which a legal title were held by the federal or provincial government.

The implications of that have to be examined very carefully, I think, given the difficulties of ascertaining the law applicable to Indian reserve lands. I cite in particular a proposal that has been floated around for a few years. I don't believe this has been put in the form of a bill yet. It's been called under various names, including the first nations property ownership act. I've concluded in my work that what has been proposed, at least so far as I've gathered from reading a book by some people who are not lawyers, that the objective of creating fee simple on-reserve land is constitutionally impossible. In fact, that may be one of the reasons why the bill hasn't surfaced yet.

The Chair: Mr. Chartrand—

Mr. Paul Chartrand: One has to be very careful with these amendments.

The Chair: I apologize.

I hate to jump in but we're significantly over the allotted time. We'd like to give you a few minutes to conclude, if you'd like.

Mr. Paul Chartrand: Thank you.

I'll have a look to see which are, perhaps, the most significant points.

Some cleaning up needs to be done with respect to the proposal regarding intoxicants. There's an ambiguity as to the continuing authority of a chief and council to make laws with respect to intoxicants. That should be looked at.

The proposal that by-laws made by a band come into effect upon publication has to be looked at very, very carefully. The minister continues to have the authority as an administrator of affairs on reserve. Cabinet continues to have authority to make regulations, as does the minister. How are you going to reconcile the two? If by-laws come into force upon publication, and the minister subsequently wishes to exercise his discretionary authority to not approve them, how is that to be done? I would propose that a whole catalogue of new regulations be created prior to the coming into force of the legislation. This really needs to be thought through, it seems to me. Maybe it has been thought through, but there's nothing available to me from the government to indicate how these two apparently irreconcilable things would happen.

Mr. Chair, that wraps up my respectful submission.

Thank you very much.

The Chair: Thank you so much. We appreciate the content of your presentation.

We'll turn to you, Ms. Crowder, to begin the first seven minutes.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Mr. Chair.

I want to thank Chief Bellegarde and Mr. Chartrand for coming before us today and providing some very good testimony.

Part of what we've been hearing fairly consistently from witnesses is that changes to the Indian Act hinge on the duty to consult and accommodate. Most witnesses we've heard—there have been a few who have not said this—have said that you cannot make changes to the Indian Act without fulfilling that duty to consult and accommodate.

We had a witness who came before us last Thursday who said that in his view what needed to happen—it was Wab Kinew—was that in consultation and in full collaboration with first nations a process needed to be set out that identified timeframes, resources, and terms of reference and that those terms of reference must be developed in conjunction with first nations before you can move ahead on any changes.

Chief Bellegarde, would you comment on that? Then, perhaps, Mr. Chartrand would comment on that as well.

● (0920)

Chief Perry Bellegarde: No. I totally agree with that. Any time you're going to change any legislation or laws that affect indigenous peoples, that duty to consult and accommodate, that process, must be fully supported. Anything that's going to be effective has to be jointly done or done in concert. The terms of reference have to be jointly developed right up front and adequately resourced, and we need to make sure that all indigenous peoples, both on and off reserve, have a chance for dialogue and input. This is going to affect them for the rest of their lives and the lives of their children and grandchildren. I totally support any process that is respectful and meaningful, that ensures that those principles of consultation and accommodation are met.

There's also the question about what the threshold is. What is adequate consultation, to say that yes, the crown's obligation has been met? That threshold level is going to be key. I reiterate that we all want to get out of the Indian Act, but it's a process that has to meaningfully set up jointly with our driving the bus, if you will, in concert together, to bring about that change. I support that move towards anything that facilitates that.

Ms. Jean Crowder: Before I go to Professor Chartrand, I would point out that he and others have pointed out that the Indian Act was unilaterally imposed, and it doesn't seem to make a lot of sense to unilaterally impose changes to the Indian Act—

Chief Perry Bellegarde: Exactly.

Ms. Jean Crowder:—because it will have unforeseen consequences.

Mr. Chartrand.

Mr. Paul Chartrand: Thank you.

This is an extremely interesting subject, and I'll say yea on one side and nay on the other. It's my professional opinion that should the matter be litigated, the courts would not conclude there was a duty to consult in respect to the proposed legislation. I emphasize the structure of government that we have in this country. There are three different branches of government, as you know, and there's good reason to keep them separate. There's a tension, particularly since the charter, between the elected representatives on the one hand and the judicial appointees on the other hand about who is the last, as it were. For quite some time now, this has been an ongoing tension.

I note that one of the considerations would be that the way the court is developing this concept right now of course is that the duty arises when the government contemplates any action. The question is whether it is legislative action. When there's a government contemplating legislative action, you don't know if the legislation will pass until it passes. It's very difficult. I'm not at all confident that the court was so decided. My understanding of the current case law is that there are two decisions on it. They're only at the court of appeal level in two provinces. One says yes, and one says no. It's an open question in law. I've offered you my opinion.

That does not mean, however, that I don't believe there are good reasons for doing the kinds of consultations that Chief Bellegarde is proposing. I agree. Certainly, as I've suggested in my own comments, the government ought to adopt a policy to never amend the act without proper consultations and to do it along with first nations, because there are democratic principles that are cited. Governments are exhorted to do this, among other things, by some of the emerging human rights of indigenous people, such as we find in the preambular and substantive provisions of the United Nations Declaration on the Rights of Indigenous Peoples, by way of example.

Ms. Jean Crowder: Thank you.

I still have time?

I just want to touch on the wills and estates. The reason I'm bringing this up, on this side, is that we believe that the act shouldn't proceed. However, just do the math and recognize that if the Conservatives support it, the bill will pass.

With regard to the section on wills and estates, the Canadian Bar Association did a thorough analysis of the wills and estates clause of the bill. Their first recommendation was that we not proceed with that particular clause because it would have consequences that haven't been thought out. Custom adoption is one example.

What we're hearing in other committees is that the provincial judicial system doesn't have a good handle on the complexity of land codes in first nation communities.

I wonder if you could comment on that. I'll go to Chief Bellegarde first. Do you have any views on wills and estates and whether we should just delete that whole clause and perhaps have a further study that would outline the potential consequences?

Chief Bellegarde.

● (0925)

Chief Perry Bellegarde: On that particular section, again, any time you're off-loading responsibilities from the federal crown to the provincial crown, there are going to be issues. Provincial laws of general application applying on first nation lands are going to be very problematic.

I've always talked about occupying the field, and under first nations laws, to me—like every piece of legislation that's being developed now by this government, whether it be about matrimonial real property, the First Nations Financial Transparency Act, or amendments to the Indian Act—when we have the templates in place, those will be the laws that occupy the field.

So at Little Black Bear, there will be our own first nations wills and estates act, under first nations law and jurisdiction. We will have our own land holding tenure act, if we want to go down that route. We need to develop our own pieces of legislation; we don't want the province coming in. I think it's going to be very premature and very problematic, if that continues to go ahead, especially on wills and estates. We have to exert that jurisdiction, and having that whole piece changed is going to be very problematic, because the provinces, again, don't have their head around first nations jurisdiction, so we have to continually assert that jurisdiction.

When it comes to land, I've read all the statements by all the presenters so far. Because of subsection 91(24), the federal crown is responsible for Indians and Indian lands, but in our view as an indigenous people, the Little Black Bear First Nation is sovereign land. We don't view it as federal crown land set aside for the use and benefit of Indians. That's why, when you start talking about individual land ownership, it's problematic because we can't own land. You can't own Mother Earth. Even our world view...those things have to be considered, and always put in place.

Those are some quick comments on that.

The Chair: Thank you very much.

We'll turn now to Mr. Seeback, for the next seven minutes.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Mr. Chair.

Mr. Chartrand, it's been very educational for me to listen to a number of the comments you've made. It reminds me of being back in law school, listening to one of my professors talk about subjects that he or she knew a lot more about than I did.

I want to talk about a couple of things, and I only have seven minutes, so I'll try to get through them as quickly as possible.

One of the things we talked about is the sections on wills, which people are saying are problematic. My understanding is that if those sections are removed, then issues with respect to the legality of wills, and how those wills are interpreted, would fall under provincial jurisdiction or the provincially applicable rules.

I never did wills and estates, but my understanding is that the legal framework for wills and estates isn't significantly different, province by province, across the country—I don't know if you know that or not. So I don't see how that makes the significant change that I'm hearing.

Mr. Paul Chartrand: I have the impression, I hope, that supports your observation about the relative uniformity of wills legislation.

But my point would be that when the wills legislation was originally enacted by the provinces—and this is old law in all the commonwealth jurisdictions—it was not enacted with the consideration of the particular circumstances of indigenous peoples, the indigenous community and its family relations, in mind. That's the basic flaw.

What are the implications, exactly? I don't really know. That's why I subscribe to the idea that this particular proposal to repeal these particular provisions must be looked at very carefully, and some process should be put in place to try to do better in that regard.

Mr. Kyle Seeback: I'll switch gears.

At this committee, one of the things that has been suggested is that the word "organizations" be removed from the preamble of the bill—I'm not sure if you are aware of that or not—

Mr. Paul Chartrand: Yes.

Mr. Kyle Seeback:—and it would say that it would be legislated to work in collaboration with the first nations, rather than first nations organizations.

I noted one of your comments today in your testimony was "that [there be] no amendment...without...consultations with First Nations' representatives", which, to me, is fairly similar to "organizations".

You're shaking your head. So what's your view on that?

● (0930)

Mr. Paul Chartrand: Thank you.

No, it's not the same thing. "Representatives" is my attempt to use a neutral term.

Who are the legitimate representatives of the treaty first nations? It's up to the treaty first nations to decide that. I don't wish to refer to any particular organization. I leave it to first nations to determine it in their own ways.

Mr. Kyle Seeback: Do you think the word "organizations" should come out then?

Mr. Paul Chartrand: Yes, I do. It should simply be "First Nations". You're dealing with first nations and their representatives, whoever they might be.

The only way to deal with a first nation is to call an assembly of the entire communities, which is probably not what you want to contemplate. It's not practical. It will be the representatives. People deal through their representatives, whoever those might be, not "organizations".

I certainly agree with that.

Mr. Kyle Seeback: That leads me down another line of questioning that I've picked up a number of times, both at the committee and then subsequently with some witnesses.

When we talk about consultation, I've asked a number of questions. I know you have such extensive knowledge, so I want your opinion on this.

I've asked, "Does consultation count if you were perhaps to consult with the AFN?" The answer I got was, no, that's not considered consultation.

I've then asked, "What if it's the AFN and regional chiefs?" Some people have said, no, that doesn't count as consultation either.

I've said, "What about AFN, regional chiefs, and all first nations chiefs?" I was told at one point, no, that's not consultation either; you actually have to consult with every single first nation community.

By my count, that's about 631.

What's your view of what constitutes adequate consultation with respect to this duty to consult that we're hearing an awful lot about at the committee?

Mr. Paul Chartrand: There will be two parts to my response.

First, generally, what is consultation? What is good consultation? I would refer committee members to the description by the late Chief Justice Brian Dickson, in his formal published report to Prime Minister Mulroney, when he made his recommendations on the mandate and the membership of the Royal Commission on Aboriginal Peoples.

In that report, you will find the late chief justice's views on what is reasonable consultation. It includes—and this is the heart of it—that you will go, you will talk to people, and you will ask them their views. Then you will reflect on what you've heard. Then you will make some suggestions that seek to incorporate those views. Then you will go back and say, "This is what we heard you say. This is what we've done in order to try to include your views. Did we get it right?"

That's the gist of the late chief justice's remarks.

On the other point, which of course is a very difficult one, I would simply refer you to what state representatives do—and by "state" I mean state in a national sense, as in Canada is a state, and the U.S. is a state—in difficult situations, such as when they have to deal with different parties, or with revolutionary times, or with whatever. You do your best. You do your best and you try to deal with substantially all the different views and perspectives that exist.

I don't think we can go much beyond that. Other than that, we get tangled into little details about this and that.

I suggested at the beginning of my presentation that I would try to make some suggestions based on general principles, and this is what I'm attempting to do here.

The Chair: We'll turn to Ms. Bennett now, for the next seven minutes.

Hon. Carolyn Bennett (St. Paul's, Lib.): Thanks very much.

I think we've heard from the majority of the witnesses that the duty to consult did not take place on this particular piece of legislation.

Thank you, Mr. Chartrand, for reminding us of Justice Dickson's description of what it would look like. I think we're still hearing that this was the strength of the Royal Commission on Aboriginal Peoples, that they did go out and talk to communities and were able to hear directly from the people.

My colleagues have been asking what constitutes appropriate consultation. Maybe I'll start with the regional chief on this question.

Regional Chief Bellegarde, were you consulted on this? You are the regional chief for the member of Parliament whose private member's bill this is. Were you consulted on this bill?

● (0935)

Chief Perry Bellegarde: No. No, I was not consulted on this bill.

Just to make some comments generally, in light of the Prime Minister's commitment last year in December at the crown–first nations gathering, and in light of his commitment on January 11, to me this bill is very premature.

He talks about a process for treaty implementation. He talks about it nation by nation, treaty by treaty, looking at new mechanisms to implement treaties, and looking at new mechanisms of the crown to look at implementation of section 35.

So we're starting to look at a process to do that, and now along comes Bill C-428. If it's passed, where are the linkages? Where's the coming together? You know, when the Prime Minister is saying this publicly, and then a private member's bill is passed.... That's why I say scrap this bill.

In light of this other process, we're hoping that will be meaningful consultation and accommodation, with full inclusion and involvement of the indigenous peoples. That's what we want to push for.

Hon. Carolyn Bennett: I think we've heard a lot of people saying that as well. And it's not as if this government has too much interest in harm reduction, but if we were going to mitigate the effect of this bill, if the government refuses or of the member refuses...because I do believe there would be all-party consent if the member chose to withdraw the bill. We've heard that the least they could do would be to remove the pieces on wills and estates and fix the confusion on dry reserves and special reserves.

Regional chief, is that what you would suggest if they're going to insist on pushing this through, or is there anything that could be done to fix it? You don't think it's even worth wasting time on amendments?

Chief Perry Bellegarde: Honourable member, my position would be to scrap the entire bill and to establish the process the Prime Minister committed to and work from there. That would be more meaningful. There would be more acceptance and it would drive the process further collectively. If this bill proceeds, there will be fighting every step of the way, and that's not proper and respectful.

The Prime Minister made commitments. We're hoping that all parties will say, let's just scrap this bill, let's work with the Prime Minister and cabinet and see what...because they've made those commitments, and we're starting to go down that road about outlining a process to do that for treaty implementation, nation by nation, and to review comprehensive claims. Go back to the eight points that were committed to on January 11. That's where we want to keep going back—not a unilateral private member's bill.

I don't even want to tinker with this; just scrap it. We've created a dialogue, fantastic. But there has to be a more meaningful process with full inclusion as we move towards getting out of the Indian Act. We've had it for over a hundred years, and we're not going to change this, unilaterally, overnight. There has to be a respectful process, and I believe that's the road we have to keep going towards.

Hon. Carolyn Bennett: So to your mind this bill undermines the commitment that the Prime Minister made at the crown-first nations gathering and then in the points that were agreed on January 11.

Chief Perry Bellegarde: Totally. I don't see the connection at all and that's why I'm questioning this. That's why my position would be to scrap this Bill C-428 and start fresh with the process that's been outlined. That's where we need to go, looking at new mechanisms with full support from the Prime Minister's Office, looking at new institutions of the crown through the Privy Council Office to implement section 35 in treaties, and respect that nation-to-nation relationship. That's where we need to keep going.

Hon. Carolyn Bennett: If in good faith we were going to begin the work of replacing the Indian Act, you are saying that you would start with the commitment about implementing the treaties. Then I think what we heard from the regional chief from British Columbia was that we should create the space bottom up to actually build capacity community by community, so that you actually build your own laws.

So tell me a little bit about what that would look like and how long you think it would take and what resources would be required. What would a real commitment to get on with this job properly look like?

● (0940)

Chief Perry Bellegarde: You need a long-term strategy of 5, 10, 15 years. There has to be a strategy in place.

For example, I'm from Treaty 4. Where is the Treaty 4 process to get out of the Indian Act collectively? Where are the Treaty 6 processes? Where are the pre-Confederation treaties, the Robinson-Huron Treaty? We have all of these kinds of treaties in Canada. The issue becomes lack of implementation, lack of legal effect for those treaties, and so there has to be a process. I envision maybe 20 to 30 processes over time, but that will take us out of the Indian Act.

I don't want to live under the Indian Act, no question, but the vehicle and the process and mechanism to take me away from that would be a treaty implementation act. That has to be done for Treaty 4. Little Black Bear is part of Treaty 4; I can't work in isolation. I'm one of the 633 first nations, no question, but we're part of Treaty 4 and will always be part of that Cree nation. So Treaty 4 needs a process.

Alexander Morris represented the Queen when Little Black Bear entered into that relationship with him on behalf of the crown, but unfortunately there was nothing to give it legal effect. That Indian Act, that federal piece of legislation, is down here—not that nation high up—so we need a process treaty-by-treaty to give that effect. That to me is what the Prime Minister committed to, and I think we have to hold him and cabinet to account for that. I think this cabinet committee and the different parties you can all agree to start fresh from the beginning and go back to that. That's what I would encourage.

The Chair: Thank you very much.

We'll now turn to Ms. Ambler for the next seven minutes.

Mrs. Stella Ambler (Mississauga South, CPC): Thank you, Mr. Chair, and thank you to Chief Bellegarde and Professor Chartrand for being here today.

My questions relate to sections 82 and 85 regarding by-laws. Mr. Clarke has stated that his reason for putting forward this amendment to the Indian Act is that first nations governments are treated differently from other governments with respect to their internal affairs. At present, section 82 of the Indian Act requires by-laws made to be provided to the minister for approval. The minister has the power to disallow them.

I think that bands should have to submit their by-laws to the minister and that the minister should have the power to disallow them if he wishes.

Mr. Chartrand.

Mr. Paul Chartrand: These were the objectives that were viewed as appropriate in 1876, when the members of the Canadian Parliament believed that indigenous people, Indian people, were going to become extinct. They were setting up a system to deal with the extinction of Indian people, to pursue assimilation.

None of these provisions makes sense today. The whole thing has to be replaced. What's essential, I think, is for the government to restructure itself in order to be able to do the right thing in that regard.

One way to do this is to deal with the departmental structure it has now and to create the new institution under a senior cabinet minister —you can call it “crown treaty relations office”, for example—and to do what you're doing in the modern treaties: to make the historic treaties effective through negotiations with treaty representatives. That's the process, the institution that needs to replace the existing one.

Mrs. Stella Ambler: We are most definitely, under the present system, making some very good headway on those types of negotiations.

Mr. Paul Chartrand: I haven't seen anything in respect to reorganizing government institutions yet.

Mrs. Stella Ambler: I'm talking specifically about treaty negotiations.

Let me continue, now going on to section 85, specifically with regard to by-laws relating to intoxicants.

My colleague Mr. Clarke has stated that the goal of this section is to empower first nations, which we've discussed, and to remove the minister from the equation. The intoxicants section was a sort of unintended consequence, or so I understand. I have a little inside information that there might be a technical amendment—

Mr. Paul Chartrand: Yes.

Mrs. Stella Ambler: —so that bands can retain this power.

At that point, you would support that amendment completely, I would imagine.

Mr. Paul Chartrand: I would, subject to the general comment that I made before, in my opening remarks.

Mrs. Stella Ambler: Thank you.

When talking about the fines that are collected by the crown for breach of band by-laws, we have heard that the fines should go directly to the band, not to Her Majesty for the benefit of the band.

Can you comment on a possible amendment that would replace Her Majesty with the band, thereby allowing fees collected from by-laws to go directly to the band?

● (0945)

Mr. Paul Chartrand: I think it would be ill-advised to try to do that in one bill that is aimed at some particular sections. I think it should be done by having a look at the entire structure and the relationship between the administrative authority of the minister, on the one hand, and the authority of the band on the other hand, in respect to its handling of its finances and receipt of revenues. It has to at least be looked at in light of the entire relationship in that regard, rather than in isolation.

Mrs. Stella Ambler: I'm sorry, I don't understand your answer.

Mr. Paul Chartrand: Well, there are a number of provisions—

Mrs. Stella Ambler: Is it not a good idea to make that change and have the revenues go directly to the band?

Mr. Paul Chartrand: Yes.

Mrs. Stella Ambler: To me it seems like a no-brainer.

Mr. Paul Chartrand: In a sense it is, but it's dangerous to.... I haven't looked into the details of that particular question. I simply suggest that one ought to be very cautious about the merits of trying to engage in amending things in respect to the financial relationships between bands today and the minister without having an overall look at the implications for other parts of the act and the operations of other related legislation, for example. There is all kinds of legislation.

Mrs. Stella Ambler: I'm looking at it more as a respect issue. We don't need to be collecting the fees on behalf of.... That's why I say—

Mr. Paul Chartrand: That principle is a sound one, yes.

Mrs. Stella Ambler: You used the word “archaic” in your presentation, and some have used the word “paternalistic”. Do you believe that as a whole Mr. Clarke's measures would contribute to a less paternalistic relationship between the government and first nations?

Mr. Paul Chartrand: Different people use the word “paternalistic” to mean different things. I'm not a social scientist. I know the word “paternalism” is used a lot by people in history, education, and sociology. I'm not quite sure what they mean. I'm a father and a grandfather and I view paternalism as a wonderful thing.

Mrs. Stella Ambler: Right; it's not always bad.

Mr. Paul Chartrand: But there are other senses in which people use that term, and certainly the idea of looking after—

Mrs. Stella Ambler: I think they use it in this context to mean condescending.

Mr. Paul Chartrand: Yes, but I thought I was quite clear and forceful in my opening remarks in suggesting that the person who knows best what is good for you is you. That applies to first nations. First nations know best what is best for the interests of first nations, not people in Ottawa, with respect.

Mrs. Stella Ambler: Right.

May I ask finally whether you personally have been in touch with Mr. Clarke's office to offer input on the bill?

Mr. Paul Chartrand: Yes, I have, thank you.

Mrs. Stella Ambler: Can you give us a couple of specific examples of what you told him you would like to see incorporated in the bill?

Mr. Paul Chartrand: Yes, I suggested what I did today—some of them, not all of them. I can say—and I thank Mr. David for his very kind communications and assistance—that we had good discussions by telephone, and he said that in some particular instances he had received comments substantially similar to mine and that Mr. Clarke, as I understood the matter, was prepared to consider those amendments at committee stage.

Mrs. Stella Ambler: Good. I'm glad to hear it.

Thank you.

The Chair: Thank you so much.

We want to thank Chief Bellegarde for joining us today. We also want to thank Mr. Chartrand for being with us today.

Thanks so much for joining us.

Colleagues, we will now adjourn the meeting. Those of you who are on the subcommittee know that we will be remaining here for the next hour for a subcommittee meeting.

The meeting is adjourned.