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Chair

The Honourable MaryAnn Mihychuk

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● (1100)

[*Translation*]

The Chair (Hon. MaryAnn Mihychuk (Kildonan—St. Paul, Lib.)): Good morning, everyone.

[*English*]

I want to welcome everyone to this hearing of the Indigenous and Northern Affairs standing committee of Canada. We are here today on the unceded territory of the Algonquin people in a process that's not just superficial but recognizes that Canada has finally recognized that it's important to understand the truth and to begin a process of reconciliation with the indigenous people of Canada.

Pursuant to Standing Order 108(2), the committee is looking into issues related to specific claims and comprehensive land claims agreements. We will begin the procedure.

Today we have with us the Lesser Slave Lake Indian Regional Council, with Morgan Chapman. Committee members will remember that we met her in B.C.

We're glad to have you back; you have many faces.

We also welcome the representatives from Nunavut Tunngavik Inc. They will also be speaking for the Land Claims Agreement Coalition.

Welcome.

Both groups have 10 minutes to present, and then there will be a question period.

MPs, I'd ask you to direct your questions to whichever group, or to both, if that's your choice.

Witnesses, have you decided who's going to start?

All right, Morgan, you win. You have 10 minutes. Begin your presentation, please.

Ms. Morgan Chapman (Research Associate, Lesser Slave Lake Indian Regional Council, Treaty Aboriginal Rights Research Program): Thank you, Madam Chair.

Once again, my name is Morgan Chapman. I'm here for the second time, this time representing one of our client groups, the Lesser Slave Lake Indian Regional Council treaty and aboriginal rights research program.

Today I want to speak to you about reconciliation and the fact that the process, as it stands today, cannot take place under the framework of the current specific claims process. I would also like to acknowledge that we are on the unceded Algonquin territory.

To start, first nations receiving specific claims research services from the Lesser Slave Lake Indian Regional Council treaty and aboriginal rights research program are all signatories to Treaty No. 8. Despite the recognition and affirmation of this treaty in the Canadian Constitution, central provisions, such as the protection of the traditional aboriginal mode of life, are ineligible for submission as a specific claim. The Specific Claims Tribunal Act, in paragraph 15(1)(g), states, “A First Nation may not file with the Tribunal a claim that...is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.”

We respectfully ask that the Standing Committee on Indigenous and Northern Affairs help resolve this serious inconsistency in order to achieve Canada's reconciliation goals.

As a point of departure, it's important to note the critical distinction between specific and comprehensive claims. Canada defines a “specific claim” as addressing

> past grievances of First Nations related to Canada's obligations under historic treaties or the way it managed First Nations' funds or other assets. To honour its obligations, Canada negotiates settlements with the First Nation and (where applicable) provincial and/or territorial governments.

In other words, specific claims are those that identify outstanding breaches of Canada's specific lawful obligations to first nations. By contrast, comprehensive claims, also known as modern-day treaties, address general claims to aboriginal title not previously settled by treaty.

In order to understand the relevance of the issues at hand, one must understand the context under which Treaty No. 8 was agreed with by our member nations.

The crown intended to acquire land in British-occupied territories in North America, but the Royal Proclamation of 1763, which recognized aboriginal title, obligated it to negotiate treaties with indigenous peoples in order to open the land for settlement. Consequently, the government negotiated a series of treaties with various first nations as settlement advanced westward.

Treaty No. 8, as its sequence among the numbered treaties indicates, came near the end of this process, because the northern territory it encompassed was initially not considered as valuable as those covered by the preceding prairie treaties. However, the government's understanding of the territories' value changed abruptly in 1896 with geological surveys and the discovery of gold in the Yukon Territory, resulting in a growing recognition of the need for a treaty.

In the summer of 1898, while Ottawa developed plans to hold treaty negotiations the following spring, the first nations of the region became increasingly angry over the influx of miners. As the *Ottawa Citizen* reported:

> There are 500 Indians camped at Fort St. John who refuse to let police and miners go further north until a treaty has been signed with them. They claim that some of their horses have been taken by the miners and are also afraid that the advent of so many men into their country will drive away the fur; hence their desire to stop the travel north.

As Indian Commissioner Forget noted at the time: “no time should be lost in notifying the Indians of the intention of the Government to treat with them next Spring”. Consequently, a treaty commission was sent to negotiate Treaty No. 8, which was signed on June 21, 1899.

The commissioners, in their report following negotiations on Treaty No. 8, recounted the importance of assuring the nations that their traditional modes of life would be respected:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they [had] never entered into it ... the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provisions for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

Further assurances, such as those made by Father Lacombe, special adviser to the commission in 1899, were used to entice first nations into signing the treaty: “Your forest and river life will not be changed by the Treaty, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains. Therefore I finish my speaking by saying, Accept!”

These promises were also recounted in an affidavit signed by a witness to the negotiations, known locally as Peace River Jim, describing the promises and assurances that were given:

● (1105)

> It was only after the Royal Commission had recognized that the demands of the Indians were legitimate, and had solemnly promised that such demands would be granted by the Crown, also, after the Hudson's Bay Company Officials and Free Traders, and the Missionaries, with their Bishops, who had the full confidence of the Indians, had given their word that they could rely fully on the promises made in the name of QUEEN VICTORIA, that the Indians accepted and signed the Treaty, which was to last as long as the grass grew, the river ran, and the sun shone—to an Indian this means FOREVER.

Despite the assurances of the crown's representatives that their traditional economy and mode of life would be protected, almost immediately after the signing of the treaty laws began to be passed restricting the signatory nations' rights to hunt, fish, and trap. Thus, the main intentions driving the first nations' decision to sign Treaty No. 8, and consequently the main solemn promises of the crown, were violated.

First nation signatories recognized and understood the rights provided for within Treaty No. 8. In April 1900, Chief Kinosayoo and his councillors, who represented five of our seven member nations, formally asked Canada to uphold its provisions. Specifically, they requested the surveying of reserves, provision of agricultural implements and ammunition and twine, and other promises, such as education of their membership, and 117 years later, in the fall of 2017, Canada finalized negotiated specific claim settlements with a number of Treaty No. 8 first nations regarding provision of those agricultural benefits.

It should be noted that while this one provision has been settled, the specific claims process has not even begun to address the real issue at the heart of Treaty No. 8, which is the signatories' right to their traditional mode of life. This is because, again, under the Specific Claims Tribunal Act, these rights have been deemed ineligible for submission as a specific claim.

This was not always the case. In 1982's “Outstanding Business: A Native Claims Policy”, under “Specific Claims”, such breaches were eligible for research, submission, negotiation, and resolution. Despite “Outstanding Business” providing more opportunities for first nations to address outstanding legal obligations against the crown, the process was deeply flawed, and a 2006 Senate report entitled “Negotiation or Confrontation: It's Canada's Choice” called once again for an independent tribunal process. This eventually led to the Specific Claims Tribunal Act in 2008.

The act was a step forward in terms of providing an independent adjudication process through the tribunal, but a step backward in eliminating the ability of first nations to deal with the historical breach by the crown of its most important lawful obligation under their treaty.

As a direct result, the federal government's recent stated objectives regarding reconciliation through the specific claims process cannot be fully achieved. The courts have recognized that the treaties represent a solemn and sacred promise between Canada and the signatory nations, and until our nations have a mechanism to address and resolve Canada's outstanding legal obligations, reconciliation, in the complete sense of the word, is simply unattainable.

We respectfully request that the Standing Committee on Indigenous and Northern Affairs evaluate the act and make recommendations to amend it to address the elimination of paragraph 15(1)(g). To achieve reconciliation and preserve the honour of the crown, treaty first nations must be able to seek redress for outstanding legal obligations of the crown by addressing all solemn and sacred promises made under the treaty, not just some of them.

We obviously welcome questions today. I have provided our contact information in the brief, which we are hoping to submit by end of day tomorrow. It will also include our director's contact information, in case there is anything we can't address today.

● (1110)

The Chair: Thank you so much. That was very well presented.

We are now moving to our second group.

Whenever you're ready to start, please go ahead.

Ms. Aluki Kotierk (President, Nunavut Tunngavik Inc.): [*Witness speaks in Inuktitut*]

My name is Aluki Kotierk. I'm the president of Nunavut Tunngavik Inc. I want to thank you for the invitation to come and make a presentation to you today, and I want to offer some praise. When I walked into the Parliament building this morning, the security officer who was checking me in and making sure my bags were safe said "*nakurmiik*" as I left, and I thought, wow, that's a great indication that it's becoming a common practice that Inuit come to the Parliament building more frequently.

I'm here as the president of Nunavut Tunngavik Inc., but I'm also here as the co-chair of the Land Claims Agreements Coalition.

In 2003, the modern treaty signatories held a national conference and set up the coalition. We found that many of us had implementation problems with our agreements. We formed the coalition to bring about changes in government policies and practices so that our agreements could be fully implemented.

Of course, each treaty has its own character, and each indigenous party speaks for its own treaty. The coalition does not change that. We are not a formal legal body. We are modern treaty signatories who are working together. We include first nations, Métis, and Inuit modern treaty signatories. Our Inuit members are also members of the Inuit Tapiriit Kanatami, and our first nations members are also members of the Assembly of First Nations.

We have 29 modern treaties extending from Nunatsiavut through Nunavik and James Bay, across Nunavut and the Northwest Territories, the Yukon, and down into British Columbia. They cover almost half the land mass of Canada. Some of our members have signed more than one modern treaty. We have 26 members in our coalition. We have two chairs chosen by the members. One represents the first nations, and this has been the Nisga'a, and the other represents Inuit, and that's NTI.

We formed the coalition to pursue changes in the government's approach to implementation. These are both policy changes and organizational changes. Before I get into that, I want to speak a little more specifically about our agreement, the Nunavut agreement, and the challenges we faced in implementation.

After almost two decades of research and negotiation, Inuit signed the Nunavut agreement in 1993, 24 years ago. Ours is the largest land claims agreement in Canada. We have 31,000 Nunavut Inuit. Our agreement redefined our relationship with the Government of Canada. It represented our quest for self-determination and for decolonization.

NTI's mission is Inuit economic, social, and cultural well-being through the implementation of the Nunavut agreement. I would like to speak for a moment on the subject of self-government. I understand that is part of your mandate.

In 1993, when we signed our agreement, federal policy was not to negotiate self-government through a land claims agreement. In fact, self-government, as usually understood in a first nations context, was not our goal. Our goal was to create a new territory with its own public government.

After a long, hard battle, we achieved that, and the federal government agreed to put article 4 in our Nunavut agreement. Nunavut was established six years later. This was not in the federal land claims mandate, and I must give credit to Minister Siddon at that time for being prepared not only to think outside the box but to act outside the box.

Our agreement is made up of 42 articles, and it redefined our relationship with the crown. We don't have time to go through all the articles, but I want to highlight some of the challenges and shortfalls in Canada's performance we've had in the implementation of our agreement.

Our agreement provided for arbitration to resolve disputes as an alternative to going to court, but the two parties, government and NTI, had to agree before arbitration went forward. Anyone who fears a contrary arbitration decision will find it in their own interest to refuse arbitration, if they have that option. Over the years, every time NTI tried to refer a matter to arbitration, the federal government would refuse.

● (1115)

In 2006, frustrated by the federal government's inaction on important points in parts of our agreement, NTI went to court. We started an action for breach of contract, failure to meet fiduciary obligations, and failure to act in a way consistent with the honour of the crown.

In May 2015, we signed an out-of-court settlement agreement. As part of that settlement, the arbitration provisions of our agreement have been changed. Now either we or the crown can refer a matter to arbitration. We have not used the new process, and hopefully we will not have to, but we now have it if we need it.

It would be appropriate for all modern treaty signatories to have effective access to binding arbitration when needed. This is an aspect that this committee could examine further.

A key element of the Government of Canada's responsibilities relates to appropriate consultations with indigenous peoples. This was reconfirmed by the Supreme Court in the recent Clyde River case. I'm sure you're well aware of the details, but I want to highlight a number of things.

The Supreme Court recognized that it is the government's responsibility to ensure that consultation by an administrative tribunal such as the National Energy Board is adequate. In this case, the court decided that there was not adequate consultation with the Clyde River community. No meaningful avenues of participation were provided to the Inuit of Clyde River, for a number of reasons. These include that Inuit had not received participant funding to assist in their preparation and participation in the process. More often than not in Nunavut, we lack access to information and technical means to fully address development proposals. Some form of participant or intervenor funding is critical to our ability to participate meaningfully in such processes.

The Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission, and the National Energy Board all have their own participant funding programs. In Nunavut, development proposals are reviewed by the Nunavut Impact Review Board under the Nunavut agreement. It is funded by the federal government and does not have a participant funding program. As a result, we cannot be confident of having the means to participate effectively in assessing important projects affecting the wildlife in our areas.

The federal Nunavut Planning and Project Assessment Act was adopted to implement the Nunavut agreement. Subsection 228(1) states that the Governor in Council may establish such a funding program for Nunavut. So far, this has not been done. NTI has requested that the federal government establish a participant funding program in Nunavut. We are waiting for a response to our proposal.

I want to touch on article 23 of our Nunavut agreement, which deals with Inuit employment in both the federal and the territorial public service. The objective is a representative workforce, which in Nunavut means 85% Inuit employment, yet today Inuit make up only 18% of the senior management level and 27% of the middle management level, with an overall 50% Inuit employment percentage across our public service.

It is now over 21 years since a full set of departmental Inuit employment plans and pre-employment training plans, with hard targets and timelines and all the necessary detail to meet those targets and timelines, were supposed to have been completed. Recently we commissioned a report by PricewaterhouseCoopers on the economic loss that Inuit face from the failure to implement article 23. The study reveals that, at this rate, $1.2 billion in employment income will be lost by Inuit over the next six years, and government costs will be $500 million more than necessary.

I have a copy of this report, which I will provide to the clerk for your reference.

In my view, this file really requires political will and the injection of direct and forceful ministerial intervention. In terms of achieving a representative workforce, not only would that have an economic impact on the lives of Inuit when we have a territory where seven out of 10 children go hungry every night, but it would have an impact on the way in which programs and policies are developed and programs and services are delivered. If we have more Inuit employees, the policies will reflect Inuit ways of understanding and being, and the programs and services will be delivered in Inuktitut—and the probability for that will be much higher.

● (1120)

I understand that I don't have much time, so I'm just going to give a brief listing of some of the other implementation challenges we have.

The federal government has yet to develop a procurement program, which is required under article 24. Also, Inuit impact and benefit agreement negotiations for the heritage rivers have been outstanding for many years. As well, we've been excluded from the aboriginal fisheries strategy, despite our entitlement to benefit from government programs, and Fisheries and Oceans has yet to harmonize the fishing regulations to correspond with the Nunavut agreement.

To go back to the Land Claims Agreements Coalition, I want to state that we have a four-ten declaration, which our members approved in 2006. I'll leave a copy of that for your clerk as well. The key points are that our modern treaties are with the crown, not with Indian Affairs; we need a federal commitment to meet the broad objectives of our agreements, which must not be interpreted narrowly; implementation must be handled by senior officials; and, an independent review body should review implementation.

We would like to see an independent agency. That has not been addressed by the government. We will be emphasizing this more in the future. The Auditor General has assessed implementation of four modern treaties over the last 12 years, and that work has been very much appreciated, but we need to do more of that.

In conclusion, I draw your attention to article 37 of the United Nations Declaration on the Rights of Indigenous Peoples, which speaks to the rights of indigenous peoples and the role of states.

Qujannamiik.

The Chair: Thank you.

We're going to start a series of questions. First we will go to MP Amos.

Mr. William Amos (Pontiac, Lib.): Thank you, Madam Chair.

Thank you to our witnesses. You both have very strong presentations, which are very much appreciated.

I'd also like to note the presence of what look to be several up-and-coming leaders from Inuit communities. That is very satisfying to see.

Welcome.

I'm going to address my questions to you, Ms. Kotierk, primarily in terms of your role as president of NTI.

The story of non-implementation of the Nunavut Land Claims Agreement over that period of litigation and prior is disturbing. I'd like to give you the opportunity to describe more about what actually happened.

I want to get into the specifics around how the crown was acting or not acting, and how you think that reflects not just legal posturing but also a lack of respect in terms of the agreement that was signed, the commitments that were made, and the lack of follow-through. I mean, when you get to a point where in excess of $200 million is being agreed upon as a settlement, it's clear that the federal government knew it was in the wrong, but I'm just not sure. I think the ask early on in the litigation was in excess of $1 billion. I'm curious as to how you got to that point. What was the behaviour of the crown's representatives during that process that made it so frustrating?

● (1125)

Ms. Aluki Kotierk: *Qujannamiik*.

In terms of the agreement, the Nunavut Agreement was signed in 1993, and on April 30, 1990, the agreement in principle was signed in the community I'm from. I was a 15-year-old girl watching Minister Tom Siddon and the president of NTI, Paul Quassa, signing that agreement in principle.

I can tell you that there was a lot of excitement and hope that it would mean that we would be able to live our lives on our own terms, and whether we made mistakes or not, that at least we would be making our own mistakes. We were going to do it in our own language and in ways that understood who we were. That was the vision of Nunavut. I think that's still the vision of Nunavut, but we have yet to achieve it.

By not implementing the Nunavut agreement and the 42 articles in our Nunavut agreement, we were falling short of the dream that so much time and so many lives had been dedicated to achieving, so out of frustration, Nunavut Tunngavik Incorporated took the Government of Canada to court because, specifically in terms of article 23, we have yet to receive sufficiently detailed Inuit employment plans that talk about how many positions there are in each department, which would provide a real, concrete plan of how you would get an Inuk to fill the position.

Also, then, it's not enough to have a plan. You need to have the resources to support and implement the plan, and those things have not been forthcoming. Since the 2015 settlement agreement, it was reaffirmed that we were still going to work towards that. We're now in 2017 and we still don't have Inuit employment plans that are sufficiently detailed to satisfy our needs and to give us assurances that Inuit will be employed.

If you don't mind, I'm going to ask Alastair to provide details about the legal aspects.

Mr. Alastair Campbell (Senior Policy Advisor, Nunavut Tunngavik Inc.): I'm not sure of exactly the legal aspects, but there's a sort of general approach that was taken towards the interpretation of the Nunavut Agreement early on. When the Auditor General reviewed DIAND's implementation of it in 2003, he observed that the department tended to look not at the objectives of the agreement, but at the obligations, and in a rather narrow sense.

People focused on, let's say, 14(1)(c)(iii), and interpreted that in relation to their existing government policies and what they were free to do as a result of those policies in carrying out 14(1)(c)(iii), for example. I'm making up the numbers. The problem is that the objectives that are laid out in various places, both in the front piece, in the preamble of the agreement, and then in some of the chapters where there are objectives, tended to get glossed over.

The objective of securing greater Inuit self-reliance, for example, kind of got.... If you're working in a department where you're doing contracting, you don't think about that. I think a lack of oversight was one of the reasons. I think a lack of the ability to go to arbitration, as was pointed out, is another reason. Inuvialuit have or had arbitration; I believe they may have the only modern treaty, before we got it in 2015, to have a provision that allows them to go to arbitration whether or not the government agrees.

From what I'm told, this made the government very careful about doing what they have to do, because they do not want to face arbitration. There was a lack of incentive. If something is put off, it can take a few years, and then it gets put off again, and a person changes and the policy changes, and there's a lack of oversight and direction within the government.

Presumably that has changed a bit with the establishment of the deputy ministers' oversight committee, but this is a long-term problem, and until there's a.... This is a complicated agreement, and there are 30 of them. I don't think there's much government-wide understanding of them.

● (1130)

The Chair: That ends your portion of time, Mr. Amos. We're moving on to MP Waugh.

Mr. Kevin Waugh (Saskatoon—Grasswood, CPC): Thanks to all three of you for coming today.

In article 23, you gave percentages, which are good: 18% senior management and 27% middle management. What are the numbers, though? Let's peel this back. Percentages are fine, because you wanted 85%, but I'm looking at numbers. For 18% of senior management, what number is it? How many is that? For your 27% of middle management, and your 50%, how many people is that? I'm trying to get a perspective on population. What is your population? The goal is 85%, so if you don't mind, how many public servants in that 85% am I looking at for numbers...?

Ms. Aluki Kotierk: *Qujannamiik.*

I will be able to provide detailed information in terms of numbers, but in generalities I can talk about the footprint of the territorial government. There are about 3,000 employees for the territorial government, and 50% of that number are Inuit employees. In terms of the federal government that is located within Nunavut, the footprint is much smaller.

I know that from the NTI's perspective we've been very much focused on putting more pressure on the territorial government, because we know that if we're able to do that well, it will have a bigger impact on Inuit lives. That doesn't mean that we're taking the hook away from the federal government, but we know where we need to focus.

Mr. Kevin Waugh: Could you share with the clerk the PricewaterhouseCoopers study? I think we do need to see that. I mean, you did spend some money: there's obviously a concern and you did go to PricewaterhouseCoopers to have a study on that. I think these are pretty good jobs, and I think that's what you're talking about here.

Ms. Aluki Kotierk: That is exactly what we're talking about. The public service is one of the biggest employers in our territory, so if we're able to do a good job to ensure that Inuit can get public service jobs, not only will it be good for Inuit and their households but, as I said, it will make a big impact on the essential services the public service provides because they will be able to incorporate Inuit ways of being, or *Inuit Qaujimajatuqangit*, in their understanding, as well as being able to use Inuktitut more.

Mr. Kevin Waugh: Yes. Thank you. I know you will share that, so we'll all get a copy that we'll need to look at.

Ms. Aluki Kotierk: We have a copy that we'll provide to the clerk.

Mr. Kevin Waugh: Thank you very much.

In terms of your land claims agreement being "honoured and fully implemented", that hasn't occurred, obviously. Do you think it has? On your Land Claims Agreement Coalition, our notes say:

> The Coalition's primary objective is to "ensure that comprehensive land claims and associated self-government agreements are respected, honoured, and fully implemented...".

Have they been?

Ms. Aluki Kotierk: They have not been. That's the short answer. That was why the Land Claims Agreement Coalition was established: we recognized that our land claims agreements were not being implemented. That was a commonality amongst modern treaties. We came together in 2003 to talk about that and to try to work to get structures and policies in place that would help the federal government move forward in being able to implement.

Mr. Kevin Waugh: Yes.

The mass of this land is half of Canada. I think that's huge. What price do you put on that? When you look at your 29 modern treaties, that's a lot of land we're talking about, and a lot of land that probably 99% of Canadians don't appreciate, if you don't mind me saying that, because we have no knowledge of it, right?

● (1135)

Ms. Aluki Kotierk: I agree. I totally agree that it's not appreciated enough, but if I may take this liberty, I recognize that there's a large land mass, but I like to focus on the people. I think that not implementing the land claims agreements is having a negative impact on our people. I think that was the whole purpose of trying to achieve land claims: we wanted to make sure that our people were able to have adequate services comparable to those of other Canadians, whether or not they were appreciated by other Canadians.

Mr. Kevin Waugh: Yes, and why wouldn't you? Thank you.

Morgan, we'll go to you. Are you representing Havlik?

Ms. Morgan Chapman: No. Today it's the Lesser Slave Lake Indian Regional Council TARR program.

Mr. Kevin Waugh: Okay, but as Havlik, as that side—because we saw you in B.C.—you have a lot of clients here that you're dealing with. Maybe you can talk about Lesser Slave Lake. I see Horse Lake here and another seven. How does that all work? Can you break it down for us, if you don't mind? How many is that company representing—let's start there—in Canada or or western Canada?

Ms. Morgan Chapman: Inside Alberta and British Columbia, we're up to, I think, between 15 and 18 nations. The majority of those take the form of consolidated claims research units or TARR programs. The seven that I am here representing today are part of the Lesser Slave Lake Indian Regional Council, which I was asked by the clerk to come and represent today.

We also contract our research and writing services to the Treaty 8 Tribal Association TARR program in northern B.C., and then we have a couple of independent nations. I don't have a mandate to talk to you about them today.

If that helps...?

Mr. Kevin Waugh: Yes.

There are differences. You're dealing with Slave Lake and those seven in and B.C. and Alberta. What are the differences between the ones you represent?

Ms. Morgan Chapman: From my perspective as a researcher, you're obviously going to have different situations in British Columbia with regard to the lands question. When you get into dealing with things like assets, money, and expropriation, those are bit more similar. I would say that dealing with lands issues, because of B.C.'s joining of the confederacy.... They'd been recognized as a province for I believe over 20 years prior to joining Canada, and that creates a certain set of problems when you come to dealing with lands issues, so in Alberta.... I tend to focus more on our Alberta clients when I'm working.

Mr. Kevin Waugh: Thank you.

The Chair: That wraps up your time. We're going to move on to MP Saganash.

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, NDP): Madam Chair, thank you, and welcome to our guests. I'll give up the majority of my time to my good friend from Nunavut because I'm a good guy.

Voices: Oh, oh!

Mr. Romeo Saganash: First, I do have a very short question. I know that implementation has been an issue with modern land claims agreements throughout this country. Among the members of the coalition, how many of those agreements contained dispute resolution mechanisms to deal with conflicts and interpretation issues?

Mr. Alastair Campbell: I think most of them have something in there. My recollection is that the James Bay and Northern Quebec Agreement did not have something like that, but the Inuvialuit agreement was the next one that came along, and it did have the provision for binding arbitration. After that, the federal government tightened up and said that it wasn't going to do that again, that it had to be by mutual consent. As far as I know, the Nunavut agreement is the only one that has since achieved the binding arbitration option. I can't speak to all the other treaties, but that's my understanding.

Mr. Romeo Saganash: Thank you.

Hunter.

Hon. Hunter Tootoo (Nunavut, Ind.): Thank you, Romeo, and thank you, Madam Chair.

Ullaakkut and welcome.

My first question has to do with implementation. You talked about the lack of implementation coming from the federal government. Some of the reasons I've heard over the years for not following through on implementation or for having a narrow view, as you say, on what implementation means, have to do with the simple fact of a loss of control or the fact that it will cost some money.

I'm wondering about your experience with the coalition. Have you found that restricting the resources or the funding, having that narrow view, and the losing of control over those some of the issues are challenges that are faced in the actual true implementation of these treaties?

● (1140)

Mr. Alastair Campbell: Yes. The financial one is a problem. We know of cases where, for example, a certain amount of money has been put in an envelope for claims implementation, and it has become a question of which claimant group has enough pressure to get the money: if A gets it and B gets it, there's nothing left for C and D. That is a problem at a general level.

At the control level, I think it's often a case of senior officials having a lot on their plates and issues being delegated to officials lower in the pyramid, and the people this gets delegated to don't have any real authority to make the kinds of changes that are needed.

I don't know if that answers your question, but that's some comment.

Hon. Hunter Tootoo: That's a good stab at it, I think, Alastair.

Another thing you talked about was appropriate consultation and the lack of participant funding. You mentioned Clyde River as a really good example. They said they weren't consulted, they ended up having to go to court, and they won. You mentioned the Nunavut Impact Review Board, There are other institutes of public government. My understanding of that process is that if they are funded to ensure that the consultation does take place, that will cover off the federal government's duty to consult. My understanding as well is that when these things were developed, it was envisioned that it wouldn't be necessary, that they wouldn't be doing these consultations.

Do you think the NIRB and other institutes of public government should have participant funding to ensure that the community, the people, will have an opportunity to properly bring forward their issues and challenges in relation to any type of development?

Ms. Aluki Kotierk: Yes, I think it would be ideal to have participant funding so that Inuit groups at the community level who could potentially be impacted by various developments happening in their backyard would be able to build up the capacity, get the technical information, and be able to have positions on whether or not developments should be happening in their backyard.

Hon. Hunter Tootoo: Thank you.

The other thing you mentioned was that there is a deputy ministers oversight committee now. I think that's probably a step in the right direction. I'm just wondering if you think that's enough. Is there something more that could be done to help ensure that oversight is followed? I've been attending this committee over the last year, and a lot of groups are saying that they're hearing the political will, but they're not seeing the direction coming from the departments. I'm just wondering if there are any other suggestions either of you might be able to add to try to help move that forward.

The Chair: There are 10 seconds left, so please be really quick.

Ms. Aluki Kotierk: I think there is an additional thing that could happen. I mentioned earlier that the OAG had done some reviews on four modern treaties. I think it's important that there be a modern treaty implementation review commission that would be able to review and monitor how all the modern treaties are being implemented.

● (1145)

The Chair: Thank you.

We'll move now to MP Anandasangaree.

Mr. Gary Anandasangaree (Scarborough—Rouge Park, Lib.): Thank you, Madam Chair.

I have one question. Then I'd like to share the rest of my time with Mr. Saganash and Mr. Tootoo.

With respect to the agreement in 1993, were future rights extinguished at that point, and has there been a change in the current climate with respect to full and final release on those rights?

Mr. Alastair Campbell: There have been different approaches by the federal government. With the Nunavut agreement, what happened was title to land: Inuit gave up the aboriginal title to land in exchange for ownership in fee simple and all the other things in the agreement. Other aboriginal rights that are not directly tied to ownership of the land are not affected by the agreement.

Mr. Gary Anandasangaree: Thank you.

Mr. Saganash.

Mr. Romeo Saganash: I just want to come back to the challenges in terms of complete implementation of land claims agreements. My people were signatories of the first modern treaty in this country, back in 1975. I think I was 13 back then, when they signed. The problem of implementation was the biggest challenge with that agreement back in 1975.

I like giving this example. Under the James Bay and Northern Quebec Agreement, chapter 28, there's a promise that on an equal basis, Canada and Quebec would construct “a community centre” in each Cree village. It's as clear as I said it. However, that provision took some 25 to 30 years to implement, because the federal government and the provincial government claimed that there was no definition of community centre. What's a community centre? I call that bad faith.

Has it been your experience that most of the time these are questions of different interpretation by the parties?

Mr. Alastair Campbell: Often, it's problems of interpretation, and in that sense, I guess—how would say it?—there should be a federal policy that would guide interpretation, although in the general sense we would also say that there are objectives in our agreement, and they should guide the interpretation as well. Sometimes you get into a kind of lawyer's interpretation of what it means, and you say, “Well, hmm, I don't think it necessarily means that.”

But yes, there are some things, and one of the things we dealt with in the lawsuit was the Nunavut general monitoring program, which had never been set up. The agreement was quite specific: it had to be set up. Yes, the courts found with us that the government was in breach of the agreement with regard to that.

On interpretation, with article 24, which is government procurement, again.... I don't know if you want to say that it's interpretation or not. From 1993 to today, the Government of Canada has not developed a procurement policy in accordance with article 24. I realize that article 24 doesn't say exactly what should be in that procurement policy, but it does say that there has to be one and that it has to be developed with NTI, and it hasn't been.

Hon. Hunter Tootoo: Thank you, Madam Chair.

Thanks, Romeo and Gary.

Following up on that, I've heard a number of stories about how NNI and northern Inuit procurement issues are completely ignored in federal contracts. What types of challenges are there, or what are you running up against from the federal government, in developing that policy?

● (1150)

Mr. Alastair Campbell: With the Government of Nunavut, the NNI contracting policy was developed early on. It has been adjusted a number of times and, in our view, has been meeting the objectives of article 24.

On the federal side, the one bright light, I would say, is the Department of National Defence, which, for the cleanup of the DEW Line sites, did establish criteria by agreement—it negotiated an agreement with NTI—that set standards for Inuit benefits from contracting and employment benefits from contracting. That was a major accomplishment, but kind of unique.

When we went to the federal government on article 24 in a general sense, they regarded this as something special because DND has defence construction in Canada and they don't report to Treasury Board. They don't have to follow the same rules and, therefore, we can't apply the same rules to other contracts. Right now, we're still trying to negotiate a policy for article 24.

The Chair: You have 30 seconds.

Hon. Hunter Tootoo: What message would you pass on to the committee here to help achieve that and finally cross that finish line?

Mr. Alastair Campbell: Well, the message, I guess, would be to identify in your report the problems we're speaking about.

The Chair: Thank you.

The questioning now goes to MP Viersen.

Mr. Arnold Viersen (Peace River—Westlock, CPC): Thank you, Madam Chair.

Thank you to our guests for being here today.

My first round of questioning will be for Aluki Kotierk.

Did I say that right?

Ms. Aluki Kotierk: Yes.

Mr. Arnold Viersen: Our study is based on the outcomes and impacts for indigenous communities that have signed comprehensive land claim agreements. From 30,000 feet, would you say that the signing of the comprehensive land claim, under which most of your people from NTI live, has been a good thing overall?

Ms. Aluki Kotierk: The signing of the Nunavut agreement...? Has it been a good thing...?

Mr. Arnold Viersen: Yes.

Ms. Aluki Kotierk: Yes. The reason I say yes is that it gave us a sense of hope. Now we have the structure in the agreement that outlines how that needs to be achieved. The problem we have is with the implementation of it. I think that if we were able to implement it, then we would achieve the dream, and it would be positive in that sense.

Mr. Arnold Viersen: If you were to go back, given what we know now, you would say that you would sign the agreement again today; withal, if it had been implemented perfectly, you would still say yes.

Ms. Aluki Kotierk: I like that question, because if I were part of the negotiation, I think I would sign off on it, but I would add more things that were related to language, culture, social issues, and education. For me, I think those are things that could have been highlighted more to strengthen it.

Mr. Arnold Viersen: Okay. Why I asked this is that there are still areas in this country that are looking for a comprehensive land agreement. We want to make sure that as we go into those kinds of negotiations we can say to those people, yes, these are things that are positive.

Ms. Aluki Kotierk: Yes. I would give them that advice: try to incorporate some of these things that I think could have been strengthened in our agreement.

Mr. Arnold Viersen: You talked a bit about how seven out of 10 children are going to bed hungry. We did a study on suicide, and I know that the NTI has done great work on trying to reduce the suicide rate as well. We also have run across population growth in Nunavut, for example, so housing is always a big issue.

If we were to graph some of these issues before the comprehensive land agreements were in place and then after they were in place, would there be any change in the line on that graph? For children going to bed hungry, has that improved? Under the comprehensive agreement, are there fewer children going to bed hungry or are there more? Has the suicide rate gone up or down under comprehensive land claims? That's I guess what we're getting at. Does the comprehensive land agreement make life better for the average person on the ground?

● (1155)

Ms. Aluki Kotierk: I think you made reference to 30,000 feet. I'm going to go a bit higher and say that as Inuit enrolled under the Nunavut agreement we're also Canadians. When I look at the nation-building of this country and I know that the federal government has made investments into the railway from the east coast to the west coast, I feel and I truly believe that the Inuit Nunangat has been ignored. There's a void. Infrastructure investments are needed to go to the next coast. I think that as a government, as a nation, there needs to be robust infrastructure investments that are stable and address all the infrastructure needs.

You touched upon housing. I think it's not only housing. It's the diesel. It's the ports. It's the transportation. It's the broadband. You name it: in Inuit Nunangat those are the things that we don't have. We're not going to be able to achieve reasonable services comparable to those of other Canadians if those types of strategic investments are not made in our land.

I bring it back to that, I think, because if we're able to make those types of investments, over time things will become better. The overcrowding will be addressed in terms of housing, which will have an impact on the health, which will have an impact on education, and which will have an impact on suicide. It's all the social determinants of health that will be impacted by it.

Mr. Arnold Viersen: For sure. Now—

The Chair: We're over the time, MP Viersen. I'm sorry. I'm consistently giving you a bit extra.

MP Anandasangaree.

Mr. Gary Anandasangaree: With respect to dispute resolution, we've heard a bit about mediation, but this is the first time that we're really hearing about arbitration. Can you share with us your experience with respect to the arbitration process? Is something that you feel has served you well? Are there any limitations? What kinds of suggestions do you have in terms of increasing the use of arbitration as opposed to the regular court system?

Mr. Alastair Campbell: When the agreement was signed, the federal government would not agree to a system of arbitration in which NTI could refer something to arbitration unless it agreed with the referral. Perhaps we could forward you more specific information relating to that process.

I think there were something like 16 or 17 attempts on the part of NTI to arbitrate matters, which were turned down. It was one of the issues when Tom Berger was brought in as a conciliator at a certain point and suggested that the government should allow at least one case to go to arbitration, but it didn't happen. In that sense, for us, the arbitration process was mythical.

The concern that the federal government seemed to express was that if we went to arbitration, the arbitration court might make a financial award, and that would be taking away from Parliament's powers to appropriate money, because that's a parliamentary privilege, yet when you go to court, you get a judgment and have to pay money. What's the difference?

The arbitration thing was a big thing behind our decision to go to court in 2006. We have secured revision of the agreement as part of the out-of-court settlement, so we now can go to arbitration as an alternative. Now, it's not free and easy. If you decide to go to arbitration, you can't go to court afterward. That's the end of it. However, it does give us an avenue that is available and that, in the short time since we got it, we have not used.

● (1200)

Mr. Gary Anandasangaree: How about mediation? Have you had any mediations? If so, have they been successful or, relatively speaking, a good alternative to arbitration or the regular court system?

Mr. Alastair Campbell: Thomas Berger was brought in, I think in 2004 or 2005, as a conciliator because of the difficulty we were having, particularly with article 23. He did his report in 2006. That report was essentially ignored, which is part of the reason why we went to court.

The Chair: I'm afraid that ends our session for this period.

I do want to give special thanks to Ms. Chapman for coming. We were enthralled with the modern treaty, and I feel as though we didn't really have an opportunity to delve into your point. Your point that looking at rights was eligible up to 1982, and then was not, is a significant point. I think all members will take that under consideration. Your brief was very clear. We'll have a paper copy. I want to thank you for coming out. *Meegwetch*.

To the rest of you, I wish you all the best. On behalf of all of us, thank you for participating and enlightening us on the advances of Nunavut, the agreement, and the challenges that we still face. *Meegwetch*.

We'll suspend for a few minutes and then reconvene with our Special Claims Tribunal.

● (1200)

(Pause)

● (1210)

The Chair: I'll call the meeting back to order.

I want to welcome Mr. Justice Harry Slade and Jennifer Hocking.

We have heard so much about your organization.

We have been across the country. The committee has been in British Columbia in the Vancouver area, and in Winnipeg, Belleville, and Quebec. We have a trip to Yellowknife coming up. We're looking at both specific and comprehensive claims.

We look forward to your presentation. You have 10 minutes, and then there will be a series of questions from MPs. I'll try to give you signals as to how much time you have so that everything goes relatively smoothly. Welcome to our committee. We'll turn the microphone over to you. You can start when you're ready.

Mr. Justice Harry Slade (Chairperson, Specific Claims Tribunal Canada): Thank you, Madam Chairperson and honourable members. There is a briefing paper, but I regret that it's not available, as we did not have time to provide it in both official languages. You'll be receiving that in the fullness of time.

I'd like to zero in on some of the major points that have to do with the parliamentary objectives in relation to the tribunal. It is an aspect of reconciliation. One of its objects is to create conditions in which negotiations may occur. There is an express recognition of the value of mediation, and the tribunal is empowered to make rules with respect to mediation.

Just to back up a bit, what are specific claims and how did they come to be part of the national discussion? In 1974, the Calder decision in the Supreme Court of Canada split evenly on the question of whether aboriginal title had been extinguished in British Columbia. The appeal was disposed of on a technicality, but governments started to take claims seriously. Two policies were formed: one to address specific claims and another was to address comprehensive claims.

Specific claims relate to treaties, the failure to observe the provisions of treaties, reserve creation, and the federal fiduciary obligations in relation to reserves. Comprehensive claims address unceded indigenous interests in land and resources.

I view the jurisdiction of the Specific Claims Tribunal as a presiding over the death of a thousand cuts, because we're dealing not with the big, broad, nationwide questions around indigenous title and what treaties mean, but rather the particular actions of succeeding governments in relation to indigenous interests at a local level that, when found in breach, have done so much damage to the indigenous peoples of our nation.

Comprehensive claims, of course, have more to do with the colonial failure to uniformly apply the common law recognition of indigenous interests in land and resources of the indigenous nations. Who became the responsible ministry of government to deliver these programs that were intended to address these claims? Well, it became INAC.

Cultural program delivery developed in INAC, because that's what they do. However, claims cannot be addressed in processes formed around a program mindset. These are questions of justice, not of programs. Claims engage substantive questions around indigenous interests and crown fiduciary obligations, not some sort of policy that feels good because it on the surface appears to be dealing with an interest or an issue that is affecting us nationwide. How can a policy come to grips with a substantive interest of a distinctive group of Canadians known as indigenous peoples?

But it went to INAC, and it stayed there. It appears, from our work, that in large measure it's still there. This has been a problem.

● (1215)

I say that these are more matters for justice. There's a governing precept in the crown-indigenous relationship called “the honour of the crown”. The honour of the crown relates to the fiduciary relationship between the crown and indigenous peoples. This is a place for the law. It is a place where the guiding principles in a relationship, when it comes to claims, are law, based for the most part on the fiduciary relationship.

Indeed, the Supreme Court of Canada, in Haida II and Tsilhqot'in, has recently said that where treaties do not exist, there are government obligations to pursue treaty-making. Can that be done in a policy-based process that we call the “comprehensive claims policy” where there is no oversight by a body empowered to make sure that everybody's at the table and to make sure that they're there to negotiate in good faith? I say no.

Going back to what's happening on specific claims, we just heard that there are thought to be 400 claims. We opened our doors in June 2011. We've had a total of 90 claims. Why is that? Many of the claims that have gone to hearing and resulted in decisions have gone to judicial review in the Federal Court of Appeal. There's one pending in the Supreme Court of Canada.

It's natural that people to sit back and wait to see how it works out, but early decisions of the tribunal in Kitselas that were upheld on judicial review have not resulted, it seems, in any settlements of like claims. The Auditor General has made that point.

Why is this? If you have a policy group dealing with claims at the bureaucratic level, the idea of a precedent seems to mean very little to them because it's a program to be administered.

In stakeholder consultations when I was first appointed chair—and I am the first chairperson—we engaged broadly with stakeholders, in part through the advisory committee that we're allowed to constitute under our act. We learned there that there was absolutely no interest in the federal crown in negotiating a claim that had come before the tribunal.

This puzzled us, because we're judges, and we're used to getting in there and helping litigants settle matters. Judges no longer just sit back, sphinx-like, and listen. They get involved, because if they didn't, the courts would get completely bogged down. Ninety per cent of civil filings are settled. Many, many of those are due to judicial encouragement of ADR. In some matters, ADR is required.

The answer was, “No negotiation: the minister has rejected the claim.”

With your leave, I'll take a couple of minutes longer, Madam Chairperson.

● (1220)

The Chair: I think you have a sense of humour, sir. Go ahead.

Mr. Justice Harry Slade: If you lose that, you're really lost, aren't you?

Claims come to us that have been rejected by the minister or that have been in negotiation for three years without an outcome. In answer to the question of whether there is an openness to negotiation, because the act seems to contemplate that—even mediation—they say, no, why would we negotiate? The minister has rejected the claim.

We've been going for seven years and encouraging negotiation without any take-up until very recently. This is a problem with the process below. We don't hear appeals from ministerial decisions; they're not reviews. But if the bureaucratic mindset is that the minister has rejected this so there's no basis for a negotiation in the context of proceedings before the tribunal, that's the end of it.

Now, there's no transparency in the specific claims process until you get to the tribunal. We don't even get the record that's generated there at the start of the proceedings before us. We don't know why it didn't get accepted or why the negotiation failed. If we did, we could craft a summary proceeding for early assessment—and perhaps even mini-trials, non-binding opinions—that might get the parties taking a closer look at whether or not they should be at the table. Also, we have rules providing for mediation. There has been zero take-up on that because there's been no negotiation.

What's happened recently is that there has been a change. Some matters are going into negotiation. We are being asked, however, to put claims in abeyance while they negotiate, and we hear that these negotiations are going to take five years. That's patently ridiculous. There's nothing like a trial date to motivate a negotiation, nothing like it. You put a claim into abeyance with no trial date and there's no pressure.

Five years? This is back to the future. It's those long, long lags of time. We have claims that have been in the process for 20 years that have resulted in the creation of the tribunal, and now we're being asked to allow it to go back to a process where it can languish in a bureaucrat's office—I don't use that term pejoratively, except occasionally.

Voices: Oh, oh!

Mr. Justice Harry Slade: Where is the good news here?

Well, the good news is that it seems the Department of Justice—the Minister of Justice—is now coming into the picture with respect to specific claims. You're probably aware of the September 6, 2017, joint announcement about a policy review.

I'm pretty sure that the Minister of Justice had no idea that these people from INAC were saying, “You can't push her claim in the tribunal if you want to negotiate with us.” By the way, the funding disappears for litigation before the tribunal if they go into negotiations. Where, I ask, is the good faith in that?

I'm just going to say a couple of things about comprehensive claims.

You hear much about a commitment to the UN Declaration on the Rights of Indigenous Peoples. Well, there are two things that really would have to be addressed to go anywhere with the resolution of territorial interests there.

Identify the indigenous groups. There are not 634 indigenous groups. Those are bands. There are perhaps 50 to 60 indigenous nations defined by culture and language in this nation, 23 of which are probably in British Columbia.

● (1225)

So you go to court: how long would it take before you get any answers as to whose territory is whose in a zero-sum game in court? But you can't do it, in my respectful opinion, based on government policies that empower only the policy-maker. They've done better in Australia and New Zealand. They have tribunals; they can't make decisions, but they can certainly move everybody in that direction.

We don't have that, but clearly the federal government has the power to create it, and UNDRIP asks for it. Article 27 calls for a process to be developed in consultation with indigenous peoples to bring these matters forward, to resolve the questions, and to produce lasting outcomes. I am at a complete loss to understand why we do not have that in Canada.

Thank you for giving me the extra time. I welcome your questions.

The Chair: I'm sure that our members have many.

We're going to start with MP Anandasangaree.

Mr. Gary Anandasangaree: Mr. Justice, thank you, and welcome to you and Madam Counsel as well.

I hope the chair gives us the same indulgence on time that she gave you.

Voices: Oh, oh!

The Chair: No.

Mr. Gary Anandasangaree: That was almost double what the usual time allotment is, but it's very important to hear from you.

I want to focus on specific claims as opposed to comprehensive claims. I know you have quite a bit to say on comprehensive claims, but with respect to specific claims, we've heard from a number of different witnesses who were very dissatisfied with the process, the timeline, and the lack of actual negotiations with respect to the process, as well as the cost.

What specific recommendations do you have for us that will effectively streamline the mandate of the Specific Claims Tribunal and ensure a speedy resolution? Would you recommend an almost mandatory type of mediation or other extrajudicial or “extra-formal” processes that would allow us to have earlier conclusions on these claims?

Mr. Justice Harry Slade: You can't have a negotiation without both parties buying in. If the starting point is “no negotiation because the minister has rejected the claim and that's why we're here”, there's nothing we can really do to speed up the process before us.

I shouldn't say there's nothing. If we were to provide early assessments—mini-trials with non-binding opinions—the process could be accelerated. However, there's no point in doing it if you know that the mindset is “we're not going to negotiate”. At the end of a mini-trial, if a non-binding opinion says “we think there's something here that should be negotiated”, what should happen next is that it should go into mediation. But that takes acceptance of the non-binding opinion by the respondent. Likewise, if the non-binding opinion says there's really nothing there, then the claimants can still decide to go the whole distance in our process, but they may want to think about whether they want to commit those resources to those as well.

I think we can do it with the rules, but I'm not sure. What I'd like to see is crown support for our going down that path so we know we're not wasting our time.

● (1230)

Mr. Gary Anandasangaree: If it's within your rules, the natural question is, have you attempted it? If you have the mandate to do it, why haven't you done it?

Mr. Justice Harry Slade: Well, we've raised this with the advisory committee. We did that a couple of years back, but for whatever reason, the message seemed to be from the AFN that they were nervous that this sort of process would somehow work in favour of the crown, so we backed off from that.

We've recently met with the advisory committee and, out of that, we are developing a rule for consideration that would provide for early assessment, mini-trials, and non-binding opinions, so it's in the works.

Mr. Gary Anandasangaree: A number of people who appeared before us have raised the issue of impartiality. That's not in any way a reflection on you, but on the process. They feel that your office is appointed by the government, the funding for your office goes through the government, and funding for individual claims to groups also goes through the government, so there is some apprehension as to whether they're submitting a claim to a process that is deemed to be impartial.

How do we strengthen that? How do we ensure that confidence is there for people to come forward?

Mr. Justice Harry Slade: First, you have judges. Members of the tribunal have to be superior court judges. That deals with the first concern. If people don't accept that because members are judges they're impartial, there's nothing that can be done about that.

Mr. Gary Anandasangaree: The other element is obviously funding. When you have a big funding mechanism, this is often seen as aiding the government, or as restricting the ability of a group to go through a claim, as opposed to facilitating it.

Mr. Justice Harry Slade: In terms of support of the tribunal, we have the funding, and I don't have any reason to think we won't continue to have it.

I don't like having been thrust under the Administrative Tribunals Support Service of Canada, because it could raise a question of institutional bias, but so far, so good. They're giving us everything we need.

The key here is adequate funding to the claimant community and adequate funding to the offices of the crown that have to deal with these claims. We often hear from crown counsel their frustration that they can't hire the historian they need, or they can't hire the expert witness they need. Even if they had the money to hire them, they'd have to go through a three-month procurement process, which seems to me quite ludicrous, but then I come from the private sector. In my law firm, if we wanted something, we went out and bought it.

The Chair: It doesn't seem to be the situation with the federal government.

Now we'll go over to MP Cathy McLeod.

Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC): Thank you. I certainly appreciate your wise words and the 100,000-foot level.

If I recall, when you were here last, you said that you wanted to retire but there were no replacements around. There was a real challenge in terms of getting judges for the panel. Can you tell us where that's at now?

Mr. Justice Harry Slade: Well, it's pretty much exactly where it was.

I don't want to retire, but I have three years left in my term and I'm going to have to retire. My concern is that it takes a while to really develop a successor.

Here, we come back to a problem around the members being judges; members should be judges. However, if governments aren't going to keep judicial complements at an adequate level to enable the courts to do their work, they're not going to get volunteers from the courts. Even if they do, the chief justice's first obligation is to ensure that the court can do the work that's put before it. That has been a chronic problem: not having enough judges on the courts.

The questions of independence that trouble judges greatly, and not all are satisfied that the independence of the tribunal is as well protected as is their independence as members of the court. I think we can deal with that. I'm aware now that there is a recommendation going to the minister for an appointment of a person for a long enough period, full time, so for the succession issue, I think we might be approaching a solution to that.

Mrs. Cathy McLeod: Right now, is it fair to say that it's the same complement of judges that it was when we heard from you about a year ago?

● (1235)

Mr. Justice Harry Slade: Yes.

Mrs. Cathy McLeod: You're hopeful, but the backlog is creating issues.

Mr. Justice Harry Slade: We're going to lose a couple of members due to people hitting the magic age when judges get the boot.

Mrs. Cathy McLeod: Maybe it was the others who I remembered who were retiring, not you.

Mr. Justice Harry Slade: I think we're going to get at least two new members in short order, one of whom would be appointed on terms that could address the succession issue. We have an existing member from the Quebec court who's younger, and I'm hoping that Justice Mayer will re-enlist. I think the succession question is going to be capable of being addressed.

Mrs. Cathy McLeod: We heard from two groups earlier. I believe you heard part of their testimony.

The witness from Lesser Slave Lake talked about how the scope should be wider in order to deal with the issues. At the time, I didn't get a chance to ask her a question. She thought that your scope should be wider.

I thought at the time that the treaties really.... The AG spoke about the government's having a system that clearly articulates their obligations under the treaty and monitors their following through on those obligations. I saw that as perhaps a mechanism to deal with issues such as those Lesser Slave Lake identified, as opposed to broadening the mandate of what was happening with specific claims. Do you have any comments on that?

Mr. Justice Harry Slade: Unfortunately, sitting back here, I couldn't hear much of what was said. My hearing isn't what it once was, so I'm not too sure that I can respond to that. What I will say is that I've heard that where treaties have been established—even modern treaties—issues are always coming up, particularly around budget funding time, over what the obligation is. It's almost as though there needs to be a tribunal to hear claims based on the failure to live up to modern treaties, which would be an absurdity. Where there are arbitration clauses, they should go to arbitration and get it done.

Mrs. Cathy McLeod: Okay.

Mr. Justice Harry Slade: They shouldn't wallow around talking to each other. They should just get it done.

Mrs. Cathy McLeod: You said you were getting more cases. You have 90 on the deck at present. Where are you right now in terms of the work?

● (1240)

Mr. Justice Harry Slade: There are around 68 that are active. The 90 include cases where there have been decisions one way or the other.

The difficulty is accessibility to the tribunal. If we cannot get into negotiation and mediation, then every claim is going to have to run the whole course. It's turned out that this costs a lot of money, and the funding isn't there for it. I think that will forever impair the ability of claimants to come to the tribunal. We need to have a process, or at least some reason, to give the claimant community the belief that we can actually move expeditiously. Right now, we can't do it.

Also, due to the lack of transparency in the policy-based process, we have to start with a brand new record, and creating that record takes time, costs money, and requires documentary research.

The Chair: The questioning goes to MP Saganash.

Mr. Romeo Saganash: Thank you, Madam Chair.

Welcome to our committee. I've listened carefully to your presentation. There was a lot of stuff that provoked further thought, on my part at least. You mentioned that this is all about reconciliation as well, and that these matters are more justice matters than anything else. I totally agree with that.

Many indigenous people who have come before us mentioned the fact that there's an incompatibility between developing policies in this country while our relations with indigenous peoples are constitutional in nature, either through treaty or as indigenous people in their constitutional status in this country. I believe the same in that sense.

You mentioned article 27 of the United Nations Declaration on the Rights of Indigenous Peoples, which is an article I refer to a lot as well. The Truth and Reconciliation Commission, in its calls to action 43 and 44, refers to UNDRIP. Call to action 44 talks about developing a national plan in conjunction with co-operation with indigenous peoples, but call to action 43, in a way, is the core call to action, whereby the commission calls on the Government of Canada, the provinces, the territories, and the municipalities “to fully adopt and implement the [UN] Declaration on the Rights of Indigenous Peoples as the framework for reconciliation”.

Would you agree that it's I think the basis we should be looking at from now on? The new government has been open to that question and has promised to adopt and implement the UN declaration. Would you agree that this committee should be looking in that direction?

Mr. Justice Harry Slade: You're getting me into a dangerous area for a judge, but I could retire any time, so you can always take a little risk.

With one qualification, I would support that idea. The qualification, however, is that if governments adopt UNDRIP as a framework, at some point they're going to have to deal with the question of free, prior, and informed consent.

Free, prior, and informed consent does not conform to the Canadian common law, because even where title is either proven or recognized—by treaty, say—there's a test for justification of infringement of a right. With respect, that is a product of decisions of the Supreme Court of Canada. There's a basic wisdom in it, because we are a nation of 35 million people drawing on a single resource—the land—and government, in my view, has to retain the power on exercise of provincial and federal jurisdictions to make decisions in relation to the land and resources in the public interest.

As I see it, the decisions of the Supreme Court of Canada create a proper balance, so your political statements based on free, prior, and informed consent are not at all helpful to this discussion. They give spokespersons a soapbox to stand on and hold this up as a golden standard that, if not achieved, means Canadian law—Canadian society—is fundamentally unjust, and that, I say, is nonsense.

As a framework, sure, but I come back to article 27. I don't know why nobody but me seems to mention it. Perhaps I'm missing something. As my wife says, “That's entirely possible, Harry.” It talks about crafting a process in consultation with indigenous groups. That, to my mind, is where you start.

Let's face it: most of UNDRIP really has long since been operable in Canada. It really comes down to the question of land and resource rights. Now, to get to that, you have to undo the Indian Act system. Sir John A. Macdonald in 1885 said that they were going to destroy tribal governance. How were they going to do it? Through the Indian Act. Read the tribunal decision in Beardy's v. Canada. It's one of mine. I addressed that.

The Indian Act has balkanized the indigenous nations in such a way that often—with respect—they don't even know who they are. In British Columbia, there are 234 bands and probably 23 nations. Why do you think we have all these overlapping claims? Because you get this group and another one 20 miles down the road; they're the same people, but they think they're different because they're two different bands. After 150 years under the Indian Act, it's not surprising, is it?

We need a process that enables these aggregations to define the indigenous groups, identify the territories, and bring about modern treaties. That, to my mind, is the real value of UNDRIP. It calls for that.

● (1245)

The Chair: All right. We have to move questioning to MP Gary Anandasangaree.

Mr. Gary Anandasangaree: Thank you, Madam Chair. I want to pick up from where my colleague left off with respect to UNDRIP.

In regard to your comments, to be honest, I'm a little surprised that with respect to implementation you would perceive it in such a way. We are in a process whereby the government has committed to implementing UNDRIP, and we have done so on a number of occasions, including the 10th anniversary of the UN Declaration in New York earlier this year. In your perception, what kinds of legislative tools will be required, if any, for it to be fully implemented within the Canadian legal system?

● (1250)

Mr. Justice Harry Slade: What kind of legislation? If we're looking at implementing recognition of indigenous groups and their territories, I don't think it's for government to do that legislatively. I think the indigenous groups have to define themselves, but there needs to be some connection to that collectivity that at common law could have a claim to be an indigenous nation.

It's not as difficult as you might think, but let's say the government said, okay, we're not going to allow the approval of a pipeline unless we have indigenous consent. Well, whose consent? Which group? It's—

Mr. Gary Anandasangaree: When you have a legal system that's fundamentally problematic and flawed in many ways because we have legalized racism in the last 150 years and in many ways have affected many of the relationships that exist today, how do we revert back to the common law itself for guidance on something like this?

Mr. Justice Harry Slade: I'm certainly not going to endorse the idea that we have legislatively based entrenched racism. What we have in my view is the colonial legacy of racism that has produced the reserve system and has thoroughly marginalized indigenous peoples.

Indigenous peoples as individual Canadians have the same rights as everybody else, so where is your race-based legislation that says any differently? It's the legacy of colonialism that's still being played out by the Indian Act that has resulted in the impoverishment of indigenous peoples. Some argue that the Indian Act provides for indigenous peoples that which is not available to others, and the fact is that it does, so—

Mr. Gary Anandasangaree: Some would argue that the outcomes speak for themselves. Yes, the Indian Act is one aspect of it, but certainly, if you look at the plethora of evidence that exists with respect to socio-economic indicators, I think you could conclude that there are some very significant effects of it, and it does have a racialized impact, particularly towards our indigenous population.

Mr. Justice Harry Slade: I suppose if it helps the discussion to call it “racist”, then call it racist. I don't see how it helps the discussion. For one thing, I don't see why demonizing non-indigenous people contributes anything to the discussion, which, of course, is happening. I think what we really need to do is get down to work and find real solutions to these problems and stop calling each other names.

Mr. Gary Anandasangaree: This is where I think something like UNDRIP can have a very important dimension in the relationship. I think Canada's commitment to implement.... I'd be very curious in terms of your position to hear how that could be devised within the legal system, but I think we may have exhausted this line of conversation.

Mr. Justice Harry Slade: It would start, in my view, with re-empowering the indigenous nations and getting out from under this idea that a band is a nation. The term “first nation” is a conflation of the idea of an indigenous nation into something that the government created, but of course it's politically correct. It is really nonsense. Nation-to-nation with a group of 20 people...? Please.

It seems to me that federal policy on program delivery could bring about the aggregation of communities of like culture and language. Maybe that's a place to start. Build capacity and reconstitute these aggregates by culture and language.

Foster the recreation of indigenous governance that the Indian Act destroyed, but in a modern context. To my mind, that's where government could go legislatively to turn this particular ship around. Because if you can define the groups and the territories, you're halfway there, or maybe three-quarters of the way there. Then you can take on the question of free, prior, and informed consent when you know whose consent might be required. You can craft treaties that ensure that not one group or the other holds all the cards.

● (1255)

The Chair: That concludes the time allocated, but we do have one final round of questions from MP Viersen. It will be a bit shorter than the full five minutes.

Mr. Arnold Viersen: That's making up for the last time, Madam Chair. Thank you.

Thank you as well to our guests. This has been a very interesting conversation.

I'm going to go quite a ways back in this conversation. You talked a bit about timelines. I know that from other studies we've done, we've talked about hard timelines as well. Would you recommend, when it comes to comprehensive land claim agreements, that there be a timeline, in much the same way as the timeline when you bring in a pipeline approval process? There's a timeline to it and you get a yes-or-no kind of thing.

Mr. Justice Harry Slade: The problem with timelines is, what if they don't get met? Where do you go then? The Nisga'a treaty took 25 years. To my mind, the issue is, how do treaty negotiations get moved along when they're policy based and one party to the negotiation created the policy? That party has all the power, and that's not good.

What we see in Australia and New Zealand are tribunals that can't order an outcome but that have powers under the Inquiries Act. They can make sure everybody is at the table who needs to be there. In Australia, the federal authority even did it without an assigned constitutional power in relation to indigenous peoples. Our Constitution has that in section 91(24).

To my mind, the way to break this impasse and to move things along is to create a body to oversee the resolution of indigenous territorial resource and governance claims, including giving effect to the spirit and intent of historical treaties. What happens in Australia if there's an agreement is that it becomes contained within an order of the court. I can send you a couple, if you like.

As resistant as I am to process, it's only policy-based process. I think you need a process that's driven by the legal tensions and designed to address those tensions. I think we actually have it with the tribunal; however, if you get one party that isn't really going to listen to experienced judges who say they really should be negotiating, then you can't get very far. You're into a long process that costs a lot of money. That's not good.

● (1300)

The Chair: You have more time.

Mr. Arnold Viersen: Thank you, Madam Chair. Just yell at me when my time is up.

I assume that you take cases from across the country. We're looking specifically at the comprehensive land claims. Would you say that there are fewer claims under the comprehensive land claims than, say, the number of treaties, or does it seem to be about the same percentage one way or the other?

Mr. Justice Harry Slade: It's hard to say. Most of my experience as a lawyer and as a judge is in British Columbia. I actually live there sometimes, except when I'm in beautiful Ottawa. I don't know how many groups would be aggregated to pursue treaty negotiations in British Columbia, but some think it's around 23. I think it's probably more.

What we have now is the BC Treaty Commission—bless their hearts—trying to work without a legislative mandate and with no power and receiving statements of intent from bands. Of course, the band up the street has a statement of intent, too, and it covers the exact same territory, because they're the same people. That's a tough one, yet they manage to bring about some results.

That whole process should be empowered. I don't see how it can be done without federal-provincial co-operation, but I do think that we have enough law now that the feds can say to the provinces, “Come on board voluntarily or we will just do it.”

Mr. Arnold Viersen: Thank you.

The Chair: That's a good place to wrap up. At the last meeting we had INAC in, and they indicated that 20 years ago we had 800 cases for specific claims, and now we're down to 770. Small successes, but it looks like you have a long career ahead of you, because we have a lot of work to do.

Mr. Justice Harry Slade: Yes.

The Chair: Thank you very much for attending. I'm very grateful for the patience of members. We bent the rules and we were very happy to have you here.

The meeting is adjourned.