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The Honourable MaryAnn Mihychuk

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● (1535)

[*English*]

The Chair (Hon. MaryAnn Mihychuk (Kildonan—St. Paul, Lib.)): This is the meeting of the INAN committee on a very serious issue, one that will move Canada forward in terms of reconciliation in dealing with historic wrongs. I'm very pleased to have you here.

I'll start by recognizing that we are on the unceded territory of the Algonquin people, as a reminder of the importance of that process as not only being honorary but actually reminding all Canadians of our history and the fact that we have a lot of unfinished business. This is a very timely and important discussion and we're very anxious to hear from you, pursuant to the order of reference of Wednesday, February 7, 2018, on Bill C-262, an act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.

You're here to present to us and our format is that you have 10 minutes for each presentation. After that, we'll go into a series of questions and answers from the MPs.

Paul, are you going to begin? Then I have Dwight after that.

Welcome.

Mr. Paul Chartrand (As an Individual): Thank you, Madam Chair.

In light of the nature of the subject, I should say a few words about me and my background. I'm a Michif person from Manitoba. I'm one of 12 children of a Métis trapper, fisherman, and carpenter. I was born in 1943. I've seen life in very different circumstances from what we live today. I am a retired professor of law, a practising lawyer, and I spent some 28 years, on and off, participating in deliberations in Geneva on the UN declaration.

I shall comment on three basic points today. First is the matter of interpreting the text of the declaration to apply it in Canada. I'm arguing against the formalistic approach. I will also argue the need for a rational and defensible federal recognition policy respecting the section 35 aboriginal peoples. Finally, I will suggest that the federal Royal Commission on Aboriginal Peoples, which reported in 1996, ought to be considered in designing the plan of action contemplated by Bill C-262. That was a commission, I must disclose, of which I was a member.

First, on interpretation of the text I begin by emphasizing the important statements in the preamble of the bill that treaty and aboriginal rights as well as human rights are underlying values and principles of the Constitution of Canada. Therefore, we know that no foreign ideas are being introduced here. Canada's initial hesitancy and refusal to adopt the declaration was a rather shameful retreat from what a friend and colleague described as Canada's international image: that of a boy scout. The image had been garnered by Canada's efforts internationally since the days of Lester Pearson, as you will know. It seems to me that the adoption of Bill C-262 would help to wash the mud off the boy scout's face.

Pardon me for reading some of these notes verbatim. It helps me not to yield to my propensity to act as a didactic twit, given my long career in universities.

Opposition to adoption of the declaration seems to lean, at least in the public eye, upon reasons that flow from a formalistic approach to its interpretation. The exegete must not be seduced by a close scrutiny of each word in a text. Let us keep in mind that the text of the declaration exists in six official and very different languages. The interpretation of the declaration requires throwing away the looking glass of the formalist approach, which examines each word or phrase in isolation. In each case, we must consider the relevance of all the various human rights standards evident in the declaration, as well as elsewhere in international law, and apply them to Canadian circumstances.

A realist approach to interpretation will seek to apply to each domestic situation engaging state-indigenous relations the principles and the values behind the declaration, infused as they must be with the values of the indigenous peoples to which the facts draw attention. The question is about how the human rights standards, viewed holistically, ought to apply to the facts of each case. The issue is not so much what the declaration says, but what it means.

● (1540)

Canada must begin to accept the existence of power and authority residing in various sources. I emphasize that the purpose of the declaration is to guide state-indigenous relationships. Consequently, after some time, after Canada has adopted the declaration and implemented Bill C-262, if we have focused upon the values and the purposes of the declaration, I believe that interpretative approach would allow us to say, “Well, we're getting along better now, aren't we?” Is that not the true object?

My second point is that Canada must adopt a defensible policy to recognize the aboriginal peoples, in section 35, and to perform its constitutional duty to make those rights effective.

Who are the aboriginal peoples? I have a book with that very title. Nobody on the indigenous side wanted to touch this question in Geneva. Some states were reluctant to accept the declaration without a definition. My point here is that adoption of the declaration will add little to the promotion of an understanding of the issues here, and it's a very vexed issue.

The most salient issues are reaction to the 1982 recognition of the rights of aboriginal peoples. Our problem lies in history, in Canada's traditional policy, which has been rooted in the Indian Act. Unilaterally, in a breach of treaties, this act purported to offer legal recognition to Indians. The problem is that the Indian is a ghost of the European imagination.

Canada's aboriginal peoples, the ones who have been here aboriginally or since the beginning, are the Mi'kmaq, the Tlingit, the Cree, notably the Haida, and so on. The descendants of some of these aboriginal peoples who have not been recognized in the act are trying to fit themselves into the category of section 35, aboriginal peoples.

The name that's been applied to these people historically has been non-status Indians. Their situation has been obscured by the large number of claims from self-identifying mixed-blood peoples across the country since the 1980s. As the courts have held, section 35 affirms rights that are based on historical state-indigenous relations of peoples, not upon personal antecedents. One of the points is that the consultations that have to occur under Bill C-262 must keep these points in mind.

My final point concerns the national action plan with consultations. A serious look should be given to the analyses and recommendations of the Royal Commission on Aboriginal Peoples. Even the recent Truth and Reconciliation Commission recommended a royal proclamation as a good symbolic start. The federal government itself reorganized its structures by splitting into two departments. I have a commentary in public media on that point.

A first ministers' conference is necessary, because the provinces must be engaged in order to make the Constitution and the treaties effective, and to make the Constitution legitimate. New institutions will have to be designed. I can't think of a more important one than the model of the lands and treaties tribunal. I really urge you to have a look at volume 2 of the RCAP's analysis, which leads to the recommendation of an aboriginal lands and treaties tribunal. The specific claims policy and its related policies really do not work, and they ought to be rejected.

I will yield to the time constraints, Madam Chair.

● (1545)

The Chair: Thank you.

Mr. Newman, it's your turn. You have up to 10 minutes.

Dr. Dwight Newman (Professor of Law and Canada Research Chair in Indigenous Rights, University of Saskatchewan, As an Individual): Good afternoon. It's an honour to speak with this committee as it studies Bill C-262. I'd also like to acknowledge the Algonquin people on whose territory this meeting occurs.

My name is Dwight Newman. I'm a professor of law and Canada research chair in indigenous rights in constitutional and international law at the University of Saskatchewan.

I come here today with full respect for the very noble aspirations reflected by Bill C-262 and the passion and lifelong advocacy efforts of the member who has introduced it, the support for the bill by many civil society organizations, and the profound importance of Canada working to implement the aspirations reflected by United Nations Declaration on the Rights of Indigenous Peoples.

However, I am going to say something different than some of the other witnesses. I do come to say that I think Bill C-262 as presently drafted is framed in ways that have the potential to cause enormous unforeseeable consequences. It has a range of highly unpredictable legal effects due to two things: elements of uncertainty on the international norms referenced, and legislative drafting issues in the bill itself.

In the next few minutes I'll try to introduce some of those, although I'd also refer you to my written brief for further reference, particularly on some of the legislative drafting issues.

I would suggest that the range of possible implications of this bill is very wide, from courts giving it no effect at all on through to the courts giving it massive, unexpected effects that could inadvertently cause governance gaps, for example, by the potential implied repeal of existing statutes, on through to legal effects that could depend in complicated ways on the order in which different bills currently under consideration in Parliament are passed.

I'll explain some of that momentarily, but my ultimate question is whether it wouldn't be better for Parliament to determine what, more precisely, it's trying to do and to enact a clear bill to do exactly what it's trying to do.

In my few minutes, I'll make three main points: one related to the substantive content of UNDRIP, one related to the drafting issues in the bill, and then a third one, quickly suggesting the need for further analysis by other committees.

First, the substantive content of UNDRIP is itself subject to more debates than often realized, and a statute drawing upon the declaration is no less subject to uncertainties that arise from these ongoing debates. To offer just one prominent example, a number of articles of UNDRIP refer to the concept of free, prior, and informed consent, or FPIC. Some of those articles of the declaration refer to a requirement to have FPIC before taking certain steps, and others refer to consulting and co-operating in order to seek FPIC. The first special rapporteur after the declaration was adopted, Professor James Anaya, attributed significance to that difference and suggested that a spectrum of different duties arose in relation to different articles.

In the years since, in general terms, in international law scholarship, three main interpretations have emerged in relation to the declaration on FPIC. There's an ongoing, growing literature, but I might mention Mauro Barelli's chapter in the new Oxford commentary on UNDRIP, released this year, as a particularly helpful piece in outlining some of those concepts.

One interpretation reads the text more strictly and says that in some circumstances, the declaration says it's enough to seek FPIC in good faith without necessarily obtaining it. I've suggested that this is the implicit position that Canada's 10 principles document, issued last summer, took somewhat slyly, as I put it in an op-ed. It's arguably that interpretation, though, that is most consistent with the French-language version of UNDRIP, and with one possible interpretation of the English-language version.

A second interpretation says the FPIC requirement is really about the type of process required and that it's possible to move away from talking about consent itself as long as one has the right type of consensus-oriented process. That interpretation fits with the approach of many practitioners who are trying to work with FPIC in practical ways.

A third interpretation sees FPIC as grounding rights analogous to vetos, and that interpretation is, and continues to be, urged by many indigenous advocates. A prominent Canadian example would be found in articulations by the scholar Pam Palmater.

In the context of Bill C-262, just which of these interpretations filters through from UNDRIP has drastically different legal consequences that matter. Not knowing that poses difficulties for everyone.

● (1550)

We've seen in the events of the past week around the Trans Mountain pipeline how legal uncertainty can affect the investment climate that can contribute to prosperity for both indigenous and non-indigenous Canadians, though obviously in the context of a project on which people have many different views.

My main point is that legal uncertainty doesn't help anyone, and this bill may draw Canadian law into new uncertainties coming from uncertainties around the interpretation of UNDRIP itself.

Second, the bill as presented has significant issues from a legislative drafting perspective, which I highlight at more length in my written submission, but I'll mention some of those briefly.

One, it uses a number of legal terms that have either no, or almost no, prior use in Canadian statutes, meaning that one's essentially gambling on how the courts might interpret those terms. That might render the whole bill merely symbolic at one end or it might lead to it having very significant effects, or anything in between.

Two, the different sections of the bill are subject to some tensions as to whether it requires immediate implementation, whether it requires implementation over a multi-decade period, or something in between. That could undermine clarity of meaning.

Three, the English and French versions of the bill may not line up in terms of their language. The French versions of terms from the English side are not the same as the French terms used for the same English terms in other pieces of legislation, again suggesting that there may be more drafting issues to be carefully considered.

Four, the way in which the bill may interact with other statutes or bills gives rise to some real complexities. I go through that in what is probably painful legal detail in the brief, but I suggest that if the courts were to give the bill substantial meaning, it could lead to the implied repeal of other statutes, or provisions of other statutes—maybe the Indian Act—overnight, in a manner that could lead to governance gaps and legal vacuums. That's not the way to abolish the Indian Act, which should of course be done but needs to be done in a clear way that doesn't generate problems in the process for indigenous communities who use its governance structures.

I also raise the prospect that because of the underlying legal principles on dealing with multiple statutes enacted by Parliament, the meanings of Bill C-68, Bill C-69, and Bill C-262, if all passed, could end up being significantly different, depending on the order in which they're passed. With respect, there needs to be a coherent plan and clearer legislative drafting to address some of these issues.

Third, just very briefly, Bill C-262 has the potential and indeed the aim to affect a huge range of areas of Canadian law. Is this committee alone well placed to consider the effects on Canada's intellectual property regime of something like clause 3 in the bill? Is this committee alone well placed to consider the implications on various religious freedom contexts arising out of UNDRIP?

My written brief lists some of the very wide areas of policy-making that could be impacted if the bill is adopted, and indeed the bill hopes to affect. With respect, it's analogous to an omnibus bill, which I would suggest could warrant attention from almost every other committee of Parliament. I would urge that there be some kind of further consideration of those effects.

In conclusion, my overall view is that Bill C-262 warrants further study and careful analysis. The legislative drafting does not meet all of the standards that we would hope for in the best legislative drafting of a bill on behalf of indigenous peoples to support a better relationship between indigenous peoples and other Canadians. There are a range of highly unpredictable effects across almost every area of government policy, and those deserve study. There could well be amendments that could improve the bill, but they need to be developed with legislative drafting expertise of the sort that the justice department has but presumably hasn't provided enough of in support of this committee at this point.

The government has committed its support, but I would hope that we would see further tangible results in terms of the details of the bill, and that there would be that legislative drafting support so that the government's commitments to implementing UNDRIP are realized in the way that best fulfills those.

● (1555)

I urge that the committee call for more support for its work in examining this bill and not rest with brief statements that have been offered by the justice officials who have appeared before it thus far.

Thank you for your attention, and I'm happy to discuss matters further in questions.

The Chair: Thank you very much.

We're going to open the question period—

Mr. Richardson.

Mr. Miles Richardson (Director, National Consortium for Indigenous Economic Development): I was going to talk anyway.

The Chair: I don't blame you. You came all this way.

Mr. Miles Richardson: I am Miles Richardson. I'm from the Haida Nation out on the west coast. I'm very pleased to be here today. I also acknowledge the Algonquin people, the Algonquin nation, on whose territory we're gathered today for this very important discussion.

I want to thank Romeo Saganash and all parliamentarians for this bill, which I believe is an important signpost on the road to righting the relationship between Canada as a nation-state and the indigenous people who were the first peoples of this place we all call home and we all call Canada today. In my view, it's high time that we did this properly.

We've been to this fork in the road before, and the fork in the road is very simple. There are two routes forward. Continue on the road we're on, the colonial road, the one of denial and assimilation through the instrument of the Indian Act and all those actions that the Truth and Reconciliation Commission has confirmed for all of us is the wrong path. We could continue on that path, I suppose. The choice of the other path is exactly the right path, in my view, which the Government of Canada has stated is the chosen path for Canada, and that's establishing a proper nation-to-nation relationship between each indigenous people and Canada as a state.

Bill C-262 is a signpost for that path which, in my view, is the correct path. In 1763, we began to face the same choice. In those days, first nations in this part of the country had a bit more leverage, I'd say, on Canada. You all know the story. Britain, in right of the crown, brought to Niagara Falls its commitment on a relationship with indigenous peoples, a relationship in which the crown committed that first nations would not be disrupted in our powers, in our authorities, in our interests, or in our jurisdictions without consent through a treaty with the crown itself.

That was the commitment that Britain brought to Niagara Falls. The 27 tribes, nations, on the east coast who then met with them brought their commitments, the Two Row Wampum and the Covenant Chain. The Haudenosaunee and others brought commitments that still would pass, I would say, the test of acceptance by first nations today. I've talked to my people. I've led a lot of our negotiations and our position in terms of being respected as a nation, and working with the constitutional framework of Canada is very much in line with the Two Row Wampum and those commitments that were made in Niagara Falls. I think those were honourable commitments that didn't last long.

Last year we celebrated 150 years of Canada, and very soon, as treaties 1 to 11 began being negotiated, Canada forgot those commitments and devolved to one of the first pieces of legislation of that Parliament, the Indian Act, and the policy of the denial of our humanity and of our fundamental human rights as indigenous people began. We get to the point we are today.

I would really appeal to all of you as parliamentarians to work together as the Government of Canada to implement this proper nation-to-nation relationship. Bill C-262 is a beginning, as my friend says. It can't be the end. This has to be a whole-of-government approach. There are going to be many discussions about the legislative implications and the relationship implications. The longer we put it off, the more uncertainty is going to breed uncertainty. We're going to face many more situations like we are on the west coast today, and that's just one of them. That's so predictable in this current climate.

● (1600)

As we go down this path of establishing a proper nation-to-nation relationship, we should be guided by the Truth and Reconciliation Commission's calls to action 43, 44, and 45, which you can all read.

Action 43 asks us to use UNDRIP and free, prior, and informed consent as the framework for reconciliation. That's a wise recommendation. When we look at nation-to-nation relationships, we shouldn't be turned off by the notion of consent. We're talking about respecting each other on an equal level, and I know my people, the Haida people, expect nothing less. We come to every table with that expectation and with the acceptance, as the wise judge said in the Delgamuukw case, I believe—in the Supreme Court of Canada anyway—that we're all here to stay and that we can make this constitutional framework, including section 35, which brings our indigenous law alongside the framework of Canadian law.

We can make this work, but it's going to take commitment. Because of all the nuances that we have to work through, the one thing it's going to take is political will. If you look at the courts in the last 25 years, there's a pretty impressive winning streak of first nations asserting our title, basically legitimizing the position our people have always taken, since contact.

What has changed? Very little. Do you know why? It's because Parliament and the legislatures have not done their jobs. Those laws amount to a hill of beans. You've been put in place as parliamentarians. Those laws, those decisions of the courts amount to a hill of beans if you don't enact them. Bill C-262 is another opportunity to do the right thing.

I was going to tell you a story about Sparrow and how that... I was on the B.C. claims task force, designing a treaty-making process for B.C. in the early nineties, while RCAP was holding its hearings. We had a notion in there. We had mutual recognition on a government-to-government basis, but as soon as first nations were recognized, we had to have interim measures to balance all the federal and provincial statutes that had never contemplated aboriginal title or right.

The Minister of Fisheries flew out to B.C. and met with the first nations. I remember that he said something like, “Look, I've got a problem. Six months ago, the Supreme Court of Canada handed down its decision in Sparrow. Indigenous people have fishing rights, and I need to do something about that. I want an interim measure.”

We started negotiating an interim measure, which turned into the aboriginal fisheries policy, which started out with really good intentions and very soon degenerated into the same old “we make the rules here in Ottawa; you stand up and get your portion”.

As we go forward again, Parliament failed a major opportunity and still the courts.... There was the Heiltsuk and the herring spawn decision in 1996, which was a pure victory. They have the right to sell. The Ahousaht decision a few years ago upheld their right to sell all the fish in their territories, and still they're sitting on the beach watching everybody else do it.

Now we see the Kinder Morgan pipeline being pushed through British Columbia. We're all going to learn something from this. You mark my words. We're going to learn a lot of lessons from this situation.

● (1605)

It's unfortunate. In the face of commitments to a proper nation-to-nation relationship and this relationship being the most important, the pronouncements of the last few days that “at all costs this pipeline's going through” to me are like a dog whistle to industry and to those who have kept marginalizing indigenous people all these years, signalling that indigenous, aboriginal rights still mean nothing in this country. If anything, they mean, “You indigenous people can have the scraps after we're done.” That's just not the way to move forward.

Bill C-262 is a signpost to the proper way. It's going to take a lot of effort, it's going to take a lot of commitment on all of our parts, but it's the right way to go.

I'm really interested in hearing Val Napoleon's presentation later, after we're done, on indigenous law. If we can't do this through negotiations, this is how indigenous people are going to have to achieve our justice: through implementing our laws and figuring it out as the dust settles, I imagine.

Thank you, Madam Chair. I look forward to any further discussion.

The Chair: Thank you very much.

We now move on to questioning, and it's MP Will Amos who will start us off.

Mr. William Amos (Pontiac, Lib.): Thank you to our esteemed witnesses. It's really fabulous to have this panel before us.

I'm going to start by asking a question similar to Mr. Newman's and Mr. Richardson's, but from the flip side of the same coin. I'll ask you both to answer, one after the other, if you would.

Mr. Newman, I've read your brief. I appreciate your pointing to potential uncertainties, a series of prospective legal risks that you see may be associated with the language that has been advanced in Bill C-262. Clearly the members on this side, as well as member Saganash and our government, are very supportive of this bill, but I think that anyone who's looking at this clear-sightedly recognizes that there is going to have to be both governmental treatment as well as judicial treatment of whatever bill is enacted.

Looking at this as it is presently drafted, in a reconciliatory spirit what would you be recommending—and I invite you to make further written submissions—if you see a path forward? What mechanisms could be put in place in the context of this legislation to mitigate some of the uncertainties and to enable better interaction between existing constitutional protections for indigenous peoples and their rights, as well as through this legislation?

To Mr. Richardson I put the same question, but the other way around. I understand that there are people who are reticent, who are uncertain when they see this legislation. They don't know where it's going to take us, but as you said, we've seen the decisions one after the other, and your nation has been a leader in this regard for many years. How can greater certainty and clarity be provided to those who are concerned about writing a law into the unknown, as it might be expressed?

I feel as though I'm asking you to reconcile your positions right here and now.

Dr. Dwight Newman: I don't know whether it's difficult to reconcile our positions or not, because honestly, I don't think I disagreed with anything Mr. Richardson said. I have, however, a set of issues with respect to the particular text of the bill and the way in which it's cast.

You're asking a good question about how, specifically, it could improve in the spirit of reconciliation. The first thing I'd say is that this is not something I can easily answer, and there are two reasons for that.

One is that I think Parliament needs to decide what exactly it's trying to achieve through the bill. Is it more important to send various questions to the courts, as clause 3 of the bill would seem to do, or is it more important that Parliament face up to those questions? I think there's a tension between those two things. As you say, there will be a governmental treatment and a judicial treatment, but it's important to reflect on what judicial treatment will result from what choice is made there.

Mr. Saganash had a prior bill, Bill C-641 in a previous Parliament, that didn't have all of the same clauses as this bill, if I understand it correctly. The question would be whether there are issues that arise from having all of these same clauses that are in this bill, or is this exactly what Parliament's trying to achieve despite the uncertainties to which it may give rise?

The second reason I'm not the right one to answer that question in full is that some of the questions I raised are questions of legal interpretation, something I have to do quite regularly but that bear on legislative drafting, in which I'm not an expert. That is a very specialized expertise. There are legislative drafting experts in the justice department, and I think it's important to employ that expertise in getting the drafting questions just right.

● (1610)

Mr. Miles Richardson: Before we get down into the legal weeds and all the nuances of who does what and according to what guidelines, we need to set the context at the higher level, the relationship level. TRC's recommendation 45 to jointly develop a modern version of the royal proclamation is the right starting point. We need to commit as a nation, as Canada, and as first nations, to the nation-to-nation relationship. That is a tough business. People pick up arms all over the world before they do that. I'm not pretending it's easy but that's where we have to start, and TRC points us directly to that.

We have the Royal Proclamation of 1763. We need to do that in a modern sense, and we need to do it in a way that the Government of Canada, the Parliament of Canada, can stand up and say, “The road we've been on is the wrong one, as the TRC has reminded us. This is the way forward, and we as a nation are committed to it.” That's what a modern royal commission says, and to articulate that policy and to do it in agreement with first nations so that these discussions are not just happening on Parliament Hill. Those discussions need to be happening in every town, at every kitchen table, in family discussions across this country. That's what we didn't do the last time, in the late 1700s. We need to. We are capable of having this discussion.

Remember, each first nation's going to be a crucial part of implementing this. I don't hold Haida rights individually. I can't exercise them with me or my family or even my community. Our nation is the legitimate rights and title holder, and those are collective decisions that need effective governance to exercise them.

We need to create space and have them build up, again in a modern context. As RCAP pointed out, there are about 60 indigenous nations in today's world. That modern royal proclamation would be the beginning. I don't think every little issue has to go to court, but if every little issue has to go to court we'll be at this forever.

We can set up joint tribunals to make sure that in getting agreement, in reaching consent, we have all the modern dispute resolution tools at our disposal to achieve that. It's a big task. It's a necessary task.

The Chair: I thought you were very concise.

We're moving on to MP Cathy McLeod.

Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC): Thank you.

I certainly appreciate all the testimony we've had today. It doesn't matter your position on Bill C-262, I think the spirit of what we need to do lies with all parties in Parliament.

We're talking about Bill C-262, an important part of that path, or is there ultimately a better route forward in what we do?

In my opening speech on this, I indicated I was concerned that it wasn't government legislation because it didn't have drafters from the justice department. Mr. Newman, because it is a signatory commitment of the government, first of all, should it have been appropriated as government legislation?

I like the way you talk about the different interpretations of consent. You had it laid out into three different interpretations. Truly, I believe we should have a common understanding, or indigenous peoples should come to some kind of common understanding about that language, or is that going to have to happen after?

Again, Mr. Newman, could you speak to those issues? I have concerns about the interpretations. I think this should be government legislation.

● (1615)

Dr. Dwight Newman: On the first question, I don't know if I have a view on that or not. A private member brought forth the bill. If the government chooses to support it, I don't know the implications for the parliamentary process of a government bill versus a private member's bill. What I would say is that if the government is supporting this bill, I would hope that it would invest government resources in ensuring that the drafting is the best that it can be and would support the private member— if it is a private member's bill— in ensuring that the drafting is the best that it can be.

In terms of the second question, I think it's unrealistic to say we must have indigenous peoples or every indigenous scholar agree on what consent is. That's not going to happen quickly.

The question I would pose, then, is whether the legislation should say something specific about what version of consent the government is adopting, rather than refer to an instrument where there's an ongoing debate over what that concept means. That's where I think there are some complicated questions on implementing UNDRIP and whether the best way is to simply attach it to a provision that says it now has application in Canadian law.

Lawyers have to then advise people on what that means, when the language hasn't been used before in any statute. They have to advise on what that means for various governmental decisions, about which clients are trying to make predictions. I think that's a very challenging prospect. There would be real advantages for everyone in terms of clarity to say more things specifically in the bill about what Parliament is adhering to.

Mrs. Cathy McLeod: I think you again flagged some things that I have addressed, whether it's Bill C-45, C-68, or C-69. This bill has significant implications for all those other three bills and that is something that I don't think we've perhaps looked at or addressed very well.

I do want to talk about Kinder Morgan because I think it's a pretty good example of some of the challenges that we have. I think a mining project is somewhat easy in terms of free, prior, and informed consent, identifying whose territory it's in and ensuring that the rights and titles are respected and acknowledged and the projects move forward.

You talked about concerns from your community, Mr. Richardson. I have chiefs who run down that pipeline and who are saying, "We took it to our community. They voted 85% for it. One-third of the pipeline is going through our territory." We have communities along the whole pipeline route, and it's more than just the benefit agreements. They've taken it to their communities and 85% is not 100%, but it is significant.

What we have is rather like Canadians in general. We have a complexity of very strong feelings on this particular issue. How will government ever, if we have something like Bill C-262, align all those important considerations? Again, I look at the communities, the Shuswap people who are predominantly in one area.

It's difficult. It's complicated. I know we were grappling with it until midnight last night. It's important and I worry about where we're going to end up in terms of making sure we respect rights while still being able to move forward with things that are important for everyone who lives in this country.

Maybe we'll hear from Mr. Newman and then Mr. Richardson.

● (1620)

Dr. Dwight Newman: You can go first.

Mr. Miles Richardson: I'm not being facetious here. Read RCAP. All the answers to those questions you asked are in there. That's over 20-something years old.

What it means is.... It starts with recognition. That's part of the bill. That's part of the nation-to-nation relationship and it's recognition of nationhood. In terms of indigenous people, that means being organized as the proper rights and title holder or treaty participants. That's really important.

What's going on in B.C. right now is the company and the federal and provincial governments are going to Indian bands and those don't always correlate with the proper rights and title holders; if you want to buy a bridge in San Francisco, I have a good deal for you.

You can see that I'm trying to create a picture of what's going on there. Recognition is where it has to begin and that is not happening right now.

The Chair: The questioning now moves to MP Romeo Saganash.

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, NDP): Thank you, Madam Chair.

Thank you to all the witnesses today. I truly appreciate your contribution to our work on Bill C-262, as well as your comments. I think they're all helpful. I'm going to ask the same question to all three of you.

We've lived in a constitutional supremacy in this country since 1982. The rights in our Constitution—both in part I, the Charter of Rights and Freedoms, and in part II, the section 35 rights—the Supreme Court has recently said are sister provisions that serve to limit the powers of federal and provincial governments. That's the state in which we are today.

I have a very simple question for all three of you. Do you agree that the rights contained in the UN Declaration on the Rights of Indigenous Peoples are human rights? That's how they're viewed internationally.

Second, subclause 2(2) says that this legislation does not have the effect of delaying the application of the UN declaration in this country. Clause 3 talks about the UN declaration as being an "international human rights instrument with application in Canadian law." These rights are said to be inherent, so they do exist because indigenous people exist in this country.

It's the same question to all three of you. I only have seven minutes, one crack at this, so that's why I'm asking the same question to all three of you.

Mr. Paul Chartrand: Pardon my very bad hearing, but I'll reply to the question that I heard about whether we believe that the rights in the declaration are in the nature of human rights.

My answer is that they are part of the international human rights regime. Therefore, in that sense, absolutely, they are human rights.

If you're asking a different question, if you're asking about how the philosophy articulates the character of those rights, then the question is an open question. I'm not aware of any philosophical discussion that specifies a rationale for the existence of group rights, but they do exist. They're in the political arena, and the entire world has been involved in the wonderful process in Geneva, the wonderful achievement of state representatives and indigenous peoples representatives to come up with this declaration, which is definitely a part of the human rights system.

● (1625)

Dr. Dwight Newman: I would follow the interpretation that's offered by Professor James Anaya to the effect that UNDRIP is essentially a normative statement at the international level of how human rights apply to the circumstances of indigenous peoples around the world. I don't say that to dodge the question; that's how I would answer the question.

What I would say is that it is not necessarily a document that works as a statute in every country around the world in the same way. As a result, I'm not sure that adopting it and saying in clause 3 that it has "application in Canadian law"—something you've just referenced—is going to achieve the rights aims of the declaration itself in the most desirable way.

Mr. Romeo Saganash: Are they human rights, though?

Dr. Dwight Newman: That's the first answer that I gave. Indigenous rights are human rights, and UNDRIP is an important international normative statement on how human rights apply to the circumstances—

Mr. Romeo Saganash: But you're suggesting that with regard to these human rights in particular, we should wait some more time before we apply them, and I totally disagree with that.

Miles?

Mr. Miles Richardson: Of course they are fundamental human rights. I consider myself a human being. I am a member, I am a citizen of an ancient nation. I am the living generation of an ancient nation that has thrived very efficiently in my homelands for hundreds of generations, for thousands of years. Since beyond the memory of man we've existed as organized societies, the definition of a people under international law, and there are many examples across this country. As RCAP said, there are around 60 indigenous peoples defined by common culture, common beliefs, common languages, and common political and social institutions, so it's very much a fundamental human right.

I think, as it applies to Canadian law, we have to start with political relationship building and make sure that those laws accommodate it. The reality of those as fundamental human rights is right at this moment. I'm not going to exist, to suddenly rise to fruition when Canada recognizes me. No, I exist right now. I'm a capable human being.

That's our challenge, and we have to bridge where we are now with where we want to get. In the B.C. treaty process we call that "interim measures", but I think you're very clear on that, Romeo.

Mr. Romeo Saganash: I have just a quick question on the concept of uncertainty.

Miles and Paul, you guys were both around during the constitutional years, and I think if you compare the concept of aboriginal rights, nobody knew exactly what the content was in those days. Here is a bill proposing to clarify all of the rights that we have inherently as indigenous people.

Which of the two pieces creates more uncertainty, aboriginal rights in general, the general concept, or UNDRIP?

The Chair: One word answers, very quickly....

Mr. Miles Richardson: UNDRIP creates more certainty, definitely.

Mr. Paul Chartrand: My point would be that these are very complex and important questions. We must live comfortably with uncertainty. There are huge philosophical and cultural debates here, so there is uncertainty. Those who put too much weight on the idea of the looking-glass interpretive approach, I think, are perhaps not as comfortable with uncertainty as they might be.

The Chair: Okay.

I've had a passionate plea. MP Bossio wishes to ask a question. He promises it will be very short, because we have only 30 seconds.

● (1630)

Mr. Mike Bossio (Hastings—Lennox and Addington, Lib.): What I've been able to surmise.... Actually, this has been a perfect panel of taking the legalistic side of society and the nation-to-nation side of the argument.

Really, I guess I'd say that this is a black-letter law type of argument versus the political will side of the argument, a legalistically defined approach versus a nation-to-nation relationship defined approach, and Bill C-262 forces us to deal with this head on.

Would you agree with that?

Mr. Miles Richardson: I would agree, and I think getting down into the legal weeds before we establish the relationship and our intentions in those relationships is a recipe for trouble. It's a recipe for chasing our tails forever, and that's part of the aboriginal rights conundrum that Romeo referred to. We have to lead this by really clear, strong, and unwavering political commitment.

Even with that, as Paul says, it's not going to achieve perfect certainty, but maybe it will achieve sufficient certainty.

I'll tell you, I've been a part of agreements. Twenty-something years ago we made the first nation-to-nation agreement between the Haida Nation and Canada, which you came—

I'm just getting rolling, Madam Chair.

The Chair: I'm going to have to cut you guys off.

Dr. Dwight Newman: May I answer?

I'd just like to say that I think that choice should be avoided. I don't think the choice needs to be between making a firm commitment and the legalistic questions. A firm commitment can be offered and a sincere commitment could be offered without that being in the form of a statute in exactly this form, but further statutory measures should follow from commitment, and more specific statutory commitments.

The Chair: I knew giving it to Mike was a problem.

Mr. Mike Bossio: I was quick.

The Chair: We're going to suspend for a couple of minutes, and I invite the new presenters to come forward.

● (1630)

(Pause)

● (1635)

The Chair: All right, let's get started. We don't want to cut the time for the presenters.

I'm going to ask members to have a look at the budget very quickly. Do we want to reimburse our guests? If so, I need a mover.

Mr. Dan Vandal (Saint Boniface—Saint Vital, Lib.): I so move.

The Chair: It is moved by MP Vandal and seconded by MP Saganash.

(Motion agreed to)

The Chair: Thank you.

All right, we'll move on to business.

I want to thank you for coming. We look forward to your presentations. We have a video presenter who has been watching the activities. We're all riled up, so look out. Each one of you will have up to 10 minutes, and then we'll get around to the question period.

If we're not going to amend anything, we're going to start with Ryan Lake, move to Val Napoleon, and conclude with Ken Coates.

Okay, Ryan, it's all yours.

Mr. Ryan Lake (Partner, Maurice Law): Thank you very much.

As I indicated earlier, I will circulate my opening statement afterwards.

I'm hear to speak about my perspective and experience as a lawyer advocating for the recognition and implementation of aboriginal and treaty rights across the country and to offer some comments about the substance of a framework that gives teeth to the principles enunciated in UNDRIP.

To start, I believe the government's efforts to conclude a framework with new legislation and policy that enshrines the implementation of rights as the basis for all relations between first nations and the federal government is a critical step forward. Equally critical will be the contributions of first nation governments and their citizens to the development of any framework.

As we know, the recognition and implementation of aboriginal and treaty rights is the centrepiece of reconciliation. Section 35 of the Constitution Act recognizes and affirms these rights, but the substance of these rights has been left flapping in the winds of the courts. Very little has been done by Canadian governments in collaboration with their first nations' counterparts to implement any unifying and purposive recognition of these rights.

This failure allows historical injustices to compound. The recognition and implementation of a rights framework may provide the necessary protections of indigenous rights and ensure the promotion and realization of reconciliation.

I've looked at the articles and I've identified some related systemic challenges that I think will be addressed by the framework and that would achieve or lead to the achievement of harmonizing the laws of Canada with UNDRIP. This is just to give us some practical examples. Article 26 details indigenous peoples' rights to their lands, the development of their lands, and state protection of these lands. Article 28 provides that indigenous people have the right to redress by means that can include restitution, or when this is not possible, a just, fair, and equitable compensation for the lands and resources.

These articles are relevant to the long, ongoing effort to resolve hundreds of specific claims across the country. I previously provided a paper to a different iteration of this panel, titled “Exploring Access to Justice through Canada's Specific Claims Process”. That paper reviews features of the specific claims process that have emerged over the last 40-plus years, features of dispute resolution that have been employed to reconcile the relationships between the parties arising from these centuries' old, unresolved claims. It provides a detailed analysis and commentary on the dispute resolution process as it is today.

The desired outcome is central to the issue of redress. This begins with an unabashed legislative promotion of reconciliation among first nations, the crown, and non-indigenous populations and the resolution of these historical injustices.

Obstacles that currently exist, which may be resolved through legislated harmony with articles of UNDRIP include, for example, the elimination of the specific claims cap, which would allow for a fair and equitable redress to spill on to the specialized tribunal for the Specific Claims Tribunal.

The $150-million cap that currently exists is too low in light of development in the case law. It means that a lot of straightforward, historical grievances involving unlawful takings of land and treaty land entitlement now fall outside of the benefits of the tribunal process. By restricting claimants under the policy and before the tribunal to $150 million, you are, in effect, obstructing access to justice for countless first nations whose claims are now forced to enter the judicial process, which is filled with other challenges.

This brings us to our next obstacle, which I think flies in the face of the UNDRIP articles. These are the technical defences that are universally used by the crown in the superior courts. As we know, until 1951, first nations weren't able to retain legal counsel. Today, in every single piece of litigation before the superior courts you will find the crown defending on the basis of limitation periods, which of course, in effect, extinguish aboriginal and treaty rights by virtue of their operation. Limitation statutes should be amended to address section 35 cases. Arguably, UNDRIP principles could be a road map to justifying that.

My simple recommendation in this regard is to amend the legislation either to recognize the way you have it in the tribunal process that those limitations have no effect, or to amend them in another way that allows for a reasonable time period for first nations to file their claims. The idea that statutory limitation periods enacted by federal and provincial governments can bar reports to the courts is contradictory to the guarantee and entrenchment of aboriginal and treaty rights in section 35.

● (1640)

I'm going to jump to article 37 of UNDRIP, “Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors”.

The natural resource transfer agreement executed in 1930 transferred to Saskatchewan and two other prairie provinces, I believe, all minerals, lands, and natural resources, subject to certain conditions. One such condition was for the province to provide unoccupied crown lands to fulfill any treaty land entitlement obligations that remained left over vis-à-vis the treaties or that still existed vis-à-vis the treaties.

In 1992, in one of these provinces, the provincial and federal governments and 25 first nations signed the Saskatchewan Treaty Land Entitlement Framework Agreement. It established the framework to address outstanding TLE obligations. Part of that agreement was a path to implementing that obligation under the NRTA for those first nations that never received their entitlements or their full entitlements under treaty.

Today many of the signatories have still not been able to acquire these crown lands because the province is—for whatever reason, largely political—refusing to follow the provisions of this agreement, taking a narrow and restrictive interpretation. For example, Saskatchewan has frustrated its constitutional obligations, along with the Government of Canada, and they continue to fail to implement the terms of the treaty.

Still, while that's happening, we've had no resounding results from the courts. Saskatchewan continues a rolling online public auction of crown lands to private third parties without any notification or recognition of their commitments under the terms of the TLEFA. This matter has forced dozens of first nations into the court system, where technical defences and exhaustive procedural tactics have left the Saskatchewan first nations with no resolution to date.

Finally, there is article eight and the right not to be subject to forced assimilation or destruction of culture. We consistently work with Indian bands that were historically forcibly amalgamated with other bands or have never received recognition as an Indian band under the act, even though the minister can, with her discretion, do so at any time, and/or have not received all their entitlements that they're entitled to under the terms of the treaty.

That's my opening statement.

The Chair: Very good.

We're moving on to our next presenter, Ms. Val Napoleon.

Welcome.

Professor Val Napoleon (Associate Professor and Law Foundation Professor of Aboriginal Justice and Governance, University of Victoria, As an Individual): Thank you.

I'm delighted to be here. I've been crossing things out, so my presentation will fit within the time frames.

In addition to being a professor and research chair at the faculty of law at the University of Victoria, I'm also the director of the first-ever in the world indigenous law degree program, being launched this September at the University of Victoria.

The perspective I'm going to offer here today is that of indigenous law, and I'm going to be drawing on my research over the last several decades in order to do that. My presentation will be organized under two themes. The first is along the question of, do we need this bill? The second is, what does consent mean, and how might that be informed by indigenous law?

On the first theme of whether we need this bill, I believe it is a modest and positive step toward reconciliation. With its call for alignment and for an application of UNDRIP to federal laws, it lays a solid foundation for the future of reconciliation.

Canada has a colonial history. We all know that. Canadian legislation has not been immune from that history. While much more is required than Bill C-262 to decolonize Canada and to create space for indigenous governments, laws, and jurisdictions, the bill is a first step.

On this point, I want to mention that UNDRIP is not the source of free, prior, and informed consent, rather, FPIC is an international standard of measure for self-determination. In 2008, about 100 legal scholars and experts gave their support to UNDRIP, and they argued that UNDRIP was essentially a principled framework for achieving justice and reconciliation. Further, that it was entirely consistent with the Canadian Constitution and charter. The balancing provision in UNDRIP requires that its interpretation be according to principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith.

On the meaning of consent, I want to bring up an indigenous legal discussion, which I believe will substantively and constructively inform the implementation of Bill C-262.

If we think about consent as a collective legal and political construct that arises from systems of law, including indigenous law, it creates obligations. All legal systems recognize, create, vary, and enforce obligations. Obligations are central to the social role of law, and being able to explain obligations is about explaining authority within law. At the very minimum, we can understand consent as the voluntary acquiescence to the proposal of another. We can understand it as an act or result of reaching an accord. We can think about it as a concurrence of minds, and a willingness to act or allow an infringement of an interest.

In other words, and this is what's most important, consent is an act of reason and deliberation.

From an indigenous legal perspective, we need to think about how consent is constructed within indigenous law, and the necessary standards for consent according to indigenous law. The opportunity and the challenge created by Bill C-262 requires us to think critically about questions of indigenous law and about legitimacy. My starting place is that indigenous law must be treated seriously as law. Indigenous legal orders comprise the full scope of law necessary for any society to manage its collective affairs, be they social, political, or economic. Historically, our peoples dealt with violence, lands and resources, family issues, human rights, business and trade, and international relations.

● (1645)

Here's the thing. We know that indigenous law has not gone anywhere in Canada, but it's been undermined, and there are gaps and distortions. It's not enough to know what law is. What's important is knowing what to do when the law is broken. This means that at the very least, an indigenous legal analysis must include the legal processes for a legitimate response to a harm, a conflict, or a problem.

We need to know who the authoritative decision-makers are. What are the legal obligations? What are the substantive and procedural rights? What are the guiding legal principles? What are the public institutions that law operates through, historically and in the present day? Being able to answer these questions enables us to know what the law is and how it should be applied to today's problems. All indigenous legal orders have the intellectual resources to enable people to engage in principled reasoning processes, and that is exactly what creates legitimacy, including for the law of consent.

What are the necessary standards for consent according to indigenous law? Consent has to be lawful, according to indigenous law. In our work with over 40 indigenous communities across Canada, we see some overarching patterns. For instance, Canadian law, as with indigenous law and other systems of law, is founded on aspirations—the want for people to be better than whatever their particular circumstances are enabling them to be. We never live up to these aspirations, but what's important is that we have an opportunity to try.

Across Canada, with the different peoples that we've worked with, the aspirations have included community safety; inclusion in decisions; fairness of process for those harmed, those who have done the harming, and others who are affected; dignity and agency, based on an understanding that people have free will to operate individually and collectively; as well as flexibility and consistency in response to human problems. These aspirations can be understood as standards for consent today. They add up to conceptions of justice deriving from indigenous legal orders.

There are five takeaways that I offer here.

First is that indigenous law of consent is essential, and ensuring that expressions of consent in instruments and in political arrangements are stable and enduring means paying attention to how those matter to indigenous law.

Second, we have in Canada spaces of lawlessness created by gaps in indigenous law where it's been undermined and by a failure in Canadian law, and it's been indigenous women and girls who have faced the violence those spaces of lawlessness have created.

Third, indigenous law hasn't gone anywhere, but the ground is uneven. The important work today is to rebuild indigenous law, and it's going to take just as much work as with any other system of law in the world.

Fourth, indigenous law will make Canada a better place in ensuring that there's a multi-juridical process of working out problems. Law is one of those distinct modes of governance.

Lastly, indigenous law must be conceived on a larger legal-order scale, and the rebuilding must include indigenous human rights from within indigenous legal orders as a part of indigenous governance.

Thank you.

● (1650)

The Chair: Thank you.

Now we're going to go to the third presenter, who is coming in from Saskatoon, Mr. Ken Coates.

Oh, you're in Kelowna. I'm sorry about that.

Welcome.

Dr. Ken S. Coates (Canada Research Chair in Regional Innovation, Johnson-Shoyama Graduate School of Public Policy, University of Saskatchewan, As an Individual): Thank you very much, Madam Chair, and members of the committee. I'm honoured to speak to you about an issue I consider to be of fundamental importance to the future of Canada. I speak to you today from the homeland of the Okanagan Nation. I was supposed to be in Norway, but Toronto can't handle winter so they closed down the airport and I ended up in Kelowna instead. That makes sense to me.

My name is Ken Coates. I'm a Canada research chair at the University of Saskatchewan. I'm delighted to speak with you today.

UNDRIP came out of a remarkable international process I think we should always recognize and honour. From that process came two really key messages: first, that indigenous people have been marginalized around the world, and second, that they have articulated a strategy for their own inclusion, autonomy, and cultural survival. UNDRIP also reminds us of a simple fact that indigenous peoples have never been “given” full recognition of their rights and they've have had to fight for them constantly over many years.

When UNDRIP came to be considered by the Government of Canada, it was presented as an aspirational document. It does spell out very clearly the dreams of indigenous peoples and what should be but are not yet the goals for the people and the Government of Canada. I endorse in total the spirit of UNDRIP. It identifies what indigenous peoples desire and deserve, and it has the capacity to hold the nations of the world accountable.

The main question for today, and for all of you, is whether Bill C-262 is the right mechanism for realizing the potential of UNDRIP. While I see many parts of it to be true, I think the answer is far from clear. By the way, I'm not a lawyer. I'm an historian and a public policy person. I'm not as skilled in the nuances of the law as everybody else might be. However, I'm a practical person, so the question for me is whether this bill will result in markedly better outcomes for indigenous peoples in Canada in the short term, medium term, and the long term. At this point, what I would suggest is that the answer to that is maybe. I think we can do better than that with this bill, but also with subsequent conversations.

There's a lot of conversation about duty to consult and accommodating free, prior, and informed consent. I want to not so much deal with that as focus on some other questions. UNDRIP is a remarkable document. It is extremely comprehensive. We should all be very much aware of how broadly it is based in the needs and aspirations of indigenous people. There are a lot of articles that relate to things like improved health outcomes and education, and the protection and preservation of indigenous languages and cultures. When I look at this and see this as harmonizing these laws and actually making them mean something, just think for a second what it would actually mean for Canada, with more than 60 first nations and different languages across the country, if we actually took seriously the commitment to improve education, including in indigenous peoples' languages.

That is something we should have done 50 years ago. It's something we should have done 100 years ago. Now we have most of those nations' languages on the verge of destruction and disappearance. To just take that one issue and make it into a national priority would cost hundreds and hundreds of millions of dollars.

I'm very much in favour of what UNDRIP says about the right of self-government and a meaningful autonomy. When I think of what will actually make a difference for indigenous people, I see the re-empowerment of indigenous communities and nations with appropriate and equitable funding as being by far and away the most important thing we can have arise at the end of this, not necessarily more government programs.

One of the concerns I have about the bill is that it doesn't really outline a process for going forward and actually indicating the desired outcomes—how will we determine success? I share some of the concerns my colleague Dwight Newman expressed today about the possibility that UNDRIP could result in a rapid expansion in the legal context. If you actually look at this on a national scale over the last 20 years or 30 years, the fact that indigenous people have had no choice but to go to the courts repeatedly to fight for basic rights has had a huge impact on those communities. It has cost them hundreds of millions of dollars, without necessarily bringing the results and resolution we actually need and desire. The question is whether UNDRIP and its accommodation within Canadian laws change this dramatically.

I have another concern with this, and it goes back to when UNDRIP first came out. I work an awful lot with indigenous communities in northern Canada and across the west, and I go to talk to high school and university groups a lot. When UNDRIP first came out as a public document, there was great excitement because UNDRIP was so comprehensive and offered so many different things, promised so many different changes. My concern, and I ask you to take it very seriously, is whether Canada will once again over-promise and underperform regarding indigenous rights and entitlements. We have done so over and over again, and we have not broken that cycle. It's really interesting to think about these implications. Will this bill actually change this practice, or will it simply set us up for more evaluation and assessment over time?

● (1700)

We've had lots of commitments in the current government over the last couple of years: a statement of principles, a new framework for relations with indigenous peoples, a commitment to the rethinking of judicial processes. The latter I agree with very strongly. However, we've also had Cindy Blackstock's remarkable effort to expand social service support for indigenous communities and the fact that the battle went on for so long to address a problem that most people would recognize quite openly and consistently.

I guess the other part of this is whether indigenous communities can expect that UNDRIP would now set out operational priorities for Canada. How do we actually manage Canada under an arrangement that really does respect nation-to-nation relationships and the autonomy of indigenous people? I'm concerned that, through the annual reports, we'll now simply be annually reporting on what we haven't done, the fact that Canada has not actually responded to the opportunities before it.

I look forward either in this bill or in the subsequent implementation strategies that arise from this.... The references speak specifically to the security of existing negotiated agreements with indigenous peoples, to make sure that those agreements that have been already been put in place in good faith stay and continue on. More importantly, I'm really anxious to see that we have a commitment to a different way of making decisions in Canada. I'm in favour of what I describe as a co-production of policy. Co-production of policy is that when indigenous affairs are on the table, indigenous peoples are there as part of the process, and that when funding decisions are being made, you actually co-produce those funding priorities. It's not that a government, however well meaning, sort of sits back and does this from afar, but that it in fact negotiates with them directly.

I also would hope that, either in the presentation of this bill or in the bill itself, Parliament recognizes the complexity and potential cost of the UNDRIP commitments. To even go halfway toward meeting the obligations set out under UNDRIP would cost billions of dollars. I think it's money that we have to spend and we should have spent it a long time ago, but it will cost a great deal and take a great deal of effort to put in place.

As I look through this, I see we have an opportunity and obligation in Canada to tie all the various threads together. We have lots of things going on in the aboriginal space in this country. UNDRIP is part of the puzzle. We have the desire to build nation-to-nation relationships, the government statement of principles, the whole question of inherent and treaty and aboriginal rights, the completion of modern treaty processes, aboriginal self-government, the re-evaluation that I hope is the renegotiation of earlier treaties starting in the maritime provinces, the reform of judicial and conflict resolution systems, and the appropriate financing of indigenous services and infrastructure.

Will this bill move it in the right direction? I'm not so sure. I hope it does. I celebrate the spirit and aspirations in UNDRIP. I think the practical application is the part we have to focus on.

Let me just finish up with a quick observation. When governments make policy—not just specifically with aboriginal peoples but with all peoples in all policy areas—there are actually two elements. One element is the formulation of policy and legislation, the process that you honourable citizens are doing right now, bringing the legislation and passing it and basically declaring the government's intent, the intent of the Parliament of Canada.

The second part is the implementation of the policy. What do you actually do with it? What actually comes out the other end? We pay way more attention, as academics, policy-makers, and commentators, to the formation of policy and much less to the implementation. Without the second part, without focusing on implementation, if this bill comes into effect, if we are going to harmonize these laws, how are we going to do it, what is the time period, and what are the funding allocations? Will real change actually occur at the other end of this? Without that second level of conversation and discussion, UNDRIP will lose its effectiveness and become yet another sort of failed promise to indigenous peoples.

My overriding observation is simply this. Let's not set indigenous peoples up for failure at the hands of the Government of Canada again. We've done that too many times. We can change that trajectory and that agenda a great deal.

Thank you very much.

The Chair: Thank you.

We're now into the questioning portion of the meeting and we start off with MP Vandal.

Mr. Dan Vandal (Saint Boniface—Saint Vital, Lib.): Thanks to all of you for your presentations. They are very well appreciated.

As you all know, in Canada indigenous rights are enshrined in our Constitution, section 35. The rights of the Métis, first nations, and Inuit are declared in section 35, which really has been the foundation for the many court victories that have been referenced this afternoon by several people. Over and above the very important discussion we're having today, the Prime Minister announced several months ago that we are embarking upon a recognition of rights framework. What are those rights in section 35? How can we articulate them, describe them, and put them down on paper? We're doing that in consultation with first nations, Métis, and Inuit across Canada.

My question to all of you is very simple. Let's assume that UNDRIP gets approved in Parliament. I believe the majority are in favour of this. What is the next step? What is the next step to actually implement what we've approved?

Let me start with Ryan Lake.

● (1705)

Mr. Ryan Lake: The next step is logically going to take us to the legislative assemblies across the country, where provincial governments will now have an incentive to follow suit and decide how they're going to implement it through those powers provided them under the Constitution. However, it's also going to go into the courtroom, where we will now have, from my perspective, more teeth. I won't have to rely on the 1763 Royal Proclamation for conceptualization of what these treaty rights mean or those aboriginal rights mean. It will provide additional colour and teeth to making arguments across the spectrum of the various issues that are facing first nations.

Prof. Val Napoleon: The first step, from my perspective, is to support the rebuilding of indigenous law on the basis of indigenous legal order. That's the larger-scale legal order, rather than community by community, but looking at alliances around specific legal questions.

This is work we're doing now with the indigenous law research unit. We've been substantively articulating indigenous law around questions of lands and resources, around water, governance, and dispute resolution. We're starting to look at child welfare, as well as constitution building. It's work that is absolutely possible with support for indigenous groups to undertake, but that is building a symmetrical relationship between indigenous law and Canadian law, and it means ensuring that reconciliation includes law to law, not just entirely founded on Canadian law.

Mr. Dan Vandal: Do we not have a lot of work before that with our own laws in Parliament, not necessarily before but at least concurrently?

Prof. Val Napoleon: The work can go on concurrently, with indigenous communities taking up the homework we have to do with the rebuilding of our own legal orders.

Dr. Ken S. Coates: That is an excellent question. I would put a lot of emphasis on what I call symbolism. I think we need a national statement of reconciliation. You can call it a royal proclamation, as Miles Richardson just did. Everything everyone else said makes an awful lot of sense, but we need public engagement and we need ceremony. We need a situation where our parliamentarians, preferably at the provincial and territorial and federal levels, with all the indigenous groups participating, actually stand up collectively and say that we are on a new course. If you trickle this out through a whole bunch of legislative changes, we'll move forward a bit, but if you actually stand up and say the country has changed....

Remember 1982? I'm old enough to remember 1982, when the Constitution was patriated. Actually, immediately thereafter, people started talking differently about their country. We need that. Without that kind of major public statement, what happens in the legal process trickles out, we don't get enough engagement with it, and we don't get enough celebration of the fact that we are going to do Canada differently in the future than we have in the past.

Mr. Dan Vandal: It's often been said by several people here that UNDRIP really doesn't distill any new laws, but it clarifies them. UNDRIP is really an international instrument. Why was it necessary for Canada to adopt what was largely an international instrument to move forward?

Let me start with Val. Do you have any thoughts on that?

Prof. Val Napoleon: Law is a distinct mode of governance. It's a part of how we manage ourselves, including all of the political aspirations that reflect human beings living in societies. What UNDRIP allows us to do is to build a national imagination, a legal imagination within which it is possible to build a different kind of relationship between indigenous people and the rest of Canada. It's about building a public intellectualism within which we can see and trust in one another, and we can imagine ourselves solving problems without resorting to violence. That's the promise of law, and what we have to guard against is the failure of law, through processes of legitimacy and processes such as consent.

● (1710)

Mr. Ryan Lake: I would agree with that.

It's not so much why we had to have this international body come up with this statement of principles. I think it's a reflection of the global perspective of indigenous rights, and that's very complementary to the local perspective of indigenous rights. I think the two will work hand in hand.

The Chair: All right.

MP Waugh.

Mr. Kevin Waugh (Saskatoon—Grasswood, CPC): Welcome, everyone.

Mr. Coates, you're from my city, so I think you did the wise thing today. Head west, young man. Toronto airport is a disaster. Okanagan is much nicer than Norway.

I'm going to start first with Mr. Lake.

Welcome back. You were here in September, I believe.

Mr. Ryan Lake: Thank you for having me.

Mr. Kevin Waugh: If issues are bound to wind up in litigation, like you said, why not define terms prior to litigation?

You made that statement.

Mr. Ryan Lake: Let's use the Treaty Land Entitlement Framework Agreement as an example. That instrument, which I would argue is quasi-constitutional, actually defines what the relationship is and what those terms are. However, politically you will find that governments will make ideological decisions to circumvent or narrowly circumscribe what those mean. The result is the frustration of the ability for first nations in that context to achieve the reasonable outcome they expected when they entered into that agreement some 30 years ago.

I would see something like UNDRIP coming into the fold and saying, “Well, hold on a second here, not only is this conduct not honourable, to narrowly interpret these provisions so as to frustrate the acquisition of treaty land entitlement, but it also offends the international sense that we have a right to have this agreement enforced, and not through a series of technical legal battles that are being waged all across the province with no tangible result.”

That would maybe help a judge say that this is pretty simple: A plus B equals C.

Mr. Kevin Waugh: We've seen the provincial government selling crown lands, as Mr. Lake has said.

Mr. Coates, because you're from Saskatchewan, what are your thoughts? You're sitting at the University of Saskatchewan, and our government, whether it was this year or last year or the year before—every day you see it in the ads and newspapers—continues to sell crown lands.

I wonder if you could comment and maybe back up what Mr. Lake said earlier.

Dr. Ken S. Coates: As Ryan suggested, I believe very much that we need to find a way to bring these issues to resolution, ways in which first nations actually feel as though they have been respected and honoured in the process. The problem with these issues is that they drag on way too long and we do not have proper mechanisms to solve the problem, address the problem, and bring out a solution.

The other issue, of course, is Canadian federalism. When we try to develop a national policy for dealing with indigenous folks, we have the complications of federal-provincial relationships. Saskatchewan, for example, categorically refuses to consider resource revenue sharing. We have it in Yukon, Northwest Territories, Nunavut, Labrador, northern Quebec, and we have it under discussion in Alberta and Ontario. British Columbia has resource revenue sharing.

You end up with this hodgepodge of policies where many communities get to benefit directly from resource development activity. In Saskatchewan, sadly, it's a bit more indirect. We need to reconcile these things in a national framework where there is full [*Technical difficulty—Editor*] into it and it provides much more guidance, as Mr. Lake has suggested.

Mr. Kevin Waugh: Ms. Napoleon, we've talked a lot about the formation of policy and the implementation of policy. Can you touch on those two?

● (1715)

Prof. Val Napoleon: The underlying values for policy and for its implementation have to include democracy and the importance of law in reaching decisions that people will uphold, even if they don't get their own way. That is, their processes are legitimate and inclusive. Law and those underlying values enable people to operate from wherever they're placed within our society in a way that will ground them in a larger collective political will.

This opportunity brings together all our ideas and hopes about what is possible in Canada. Part of what's important is to recognize that law, including indigenous law, is never going to be a panacea, but that there are constructive processes through which hard decisions are going to be made. Indigenous people have always had to make hard decisions through our histories, and continue to do so today.

What are the different ways we're going to enable that to go on in the absolute fullness and depth of what's necessary to deal with the complexity? How are we going to enable people, educate people, and create the kinds of conversations that will allow all of us to act on those decisions and move forward?

Mr. Kevin Waugh: Have other nations grappled with legal questions in applying UNDRIP, and if so, how have they managed the FPIC? We've talked a lot about FPIC and other issues around here. Can we learn from anybody else?

I saw an article in *The Hill Times*, by you actually, Mr. Coates, along with Mr. Newman. You talked a bit about this. Have we learned or do we need to learn anything from other countries?

Dr. Ken S. Coates: If you don't mind my answering that one, I'll say we absolutely need to learn from other peoples. A lot of other people learn from us, by the way, and a lot of us who specialize in this field end up getting lots of invitations to other countries to talk about what we do right and what we do wrong.

We can learn from Norway. Norway actually has been very enthusiastic about accepting international instruments, such as ILO 169. I was there just a couple of weeks ago, and actually, in five different meetings, people talked about ILO 169 and said, this is why we do it and this is why we have these policies in place. That was kind of interesting to hear.

We can certainly learn a lot from what happens in New Zealand. That country signed a treaty, the Treaty of Waitangi, in 1840, but fairly quickly forgot about it. They gave new life to it in the 1970s, 1980s, and 1990s, and actually have now resurrected it as an absolute foundation of national decision-making, included the Maori in some very sophisticated and comprehensive ways, and figured out a way—as Mr. Lake was talking about in terms of conflict resolution—that allows it to work outside the legal process and more in a way of shared cultural interest. We can learn from them, as well.

We can learn in places like Australia, where they haven't done this very well, where they have marginalized indigenous people in a legal and constitutional way, and we can see the lingering effects of not accepting a national obligation to work with indigenous folks.

The Chair: Thank you.

Questioning now goes to MP Saganash.

Mr. Romeo Saganash: Thank you, Madam Chair, and thank you to all presenters.

I want to start first with Val, because I listened with interest to the initiative that you people have taken in Victoria. I know for a fact that the United Nations Declaration on the Rights of Indigenous Peoples has been translated into more than, I believe, 50 indigenous languages throughout the world.

In my language, there's no such concept as consent, but there is a concept that is between consent and veto that exists in my language, in Cree law. In fact, we incorporated that concept into one of our agreements that we signed on forestry, back in 2002, so the whole concept of *butshtenamoon* is incorporated in that 2002 agreement with Quebec.

How do you see that working in the future, given all the research you have done so far, and how can we incorporate this indigenous law into treaties and other instruments or agreements?

● (1720)

Prof. Val Napoleon: One of the major research initiatives that we have right now is working in three regions of water scarcity. We're working with the water law with the Tsilhqot'in, the Cowichan tribes, and the Lower Similkameen. In addition to the indigenous law research, we're looking at all of the related colonial law. The purpose of this, over three years, is to bring together the laws, in their integrity, to allow people to build systems of stewardship for water in their regions.

Similarly, alongside the work that we're doing with lands and resources, in addition to substantively articulating Tsimshian law and Secwepemc law, as examples, we're also looking at a similar example with both the Canadian federal and provincial laws. We're looking at ways that indigenous peoples from the different regions that we're working with are going to be able to figure out, with Canada, how the laws are going to relate and how that is going to matter insofar as the kinds of subject areas that indigenous peoples are concerned about.

Those are several examples. We have many other kinds of examples.

The work of indigenous law is absolutely possible. The legal resources that are available with indigenous law can be applied to complex problems of today, and they should be. Indigenous legal resources have much to offer the different conversations that are before the committee here and in other forums.

Mr. Romeo Saganash: Thank you. Congratulations on that incredible initiative.

The next question is to both Ken and Ryan.

Ken, you were asked whether there would be a better outcome for indigenous peoples once this legislation is passed and your answer was “maybe”. You're not too sure if anything is going to change for indigenous peoples with respect to UNDRIP. I sort of agree with that because as indigenous peoples we have a long-time experience with, on one hand, signing agreements, and the next day those agreements or treaties not being respected.

I feel that indigenous rights have been recognized and affirmed through section 35 of the Constitution. They've been recognized and affirmed under the UN declaration. They've been confirmed on many occasions by the courts. The problem has been that governments did not respect those decisions or those constitutional or international law provisions. That's the problem.

I think in a way this is going to continue even after the passage of Bill C-262, unfortunately, unless we have a brand new government on the other side of the room in Parliament that commits to doing things differently.

I would like your comment on that, both Ken and Ryan.

Dr. Ken S. Coates: If it's okay, Ryan, I'll go first.

Number one, I am astonished by the patience of indigenous peoples. We've been talking about this for 150 years and one of the most single continuities in indigenous law is government lawlessness: you pass a law; you ignore it.

Aboriginal folks win Supreme Court decisions and say, “Wow, this is great”, and then 10 years later what have you got? You have a doubling of the suicide rate. You have more marginalized people living in poverty. I find this really frustrating.

Right now all parties have reached the desire for a different relationship and wanting to move things further. Personally, since I only get a chance to say this to all of you once, I think we should take all of the issues of indigenous rights out of the partisan arena. I think what we should do is make it an all-party process for negotiating with first nations and working with first nations, Inuit, and Métis, and depoliticize it. It is too important. Indigenous people pay 100% of the price. They're the ones who are suffering. They're the ones who continue to suffer.

However, I am a complete optimist. I was actually raised in Yukon. The Yukon of 2018 is not the Yukon I grew up in in the 1960s. Indigenous peoples have been empowered. The Yukon territorial government has accepted and incorporated indigenous involvement at all sorts of different levels. The celebration of indigenous culture, language, and tradition is extremely strong. We've watched that happen in a place that quite frankly in the 1960s was discriminatory. Aboriginal people were marginalized, as you were saying, and you understand that extremely well in northern jurisdictions and resource economies. Yukon is not the same place. I wonder if we can actually take the northern experience, which is very rich and very diverse, and not look at ideas from Ottawa down, but look at ideas from the north and bring them south.

● (1725)

Mr. Romeo Saganash: Thanks.

Ryan.

Mr. Ryan Lake: I come back to this idea of how FPIC is playing out in other countries, and I think if we look at Canada, we've seen FPIC play out historically during the Laurier government when you had Indian Act provisions that provided for informed consent before reserve lands could be taken from first nations, and the result was that first nations lost 40% of their land mass during a very brief period of time.

To update and acknowledge and recognize, and decide that we're now taking this seriously, I think, is an important step in our evolution toward ensuring that we don't let those wrongs from the past emerge in the future.

The Chair: We're going to conclude with questions from MP Anandasangaree.

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

Thank you to the panel for joining us today.

Professor Napoleon, is UNDRIP part of indigenous law? It came together over an almost three-decade process. Do you think UNDRIP as a body of law addresses all the issues we can currently canvass with respect to the challenges that we have in Canada right now?

Prof. Val Napoleon: As you've pointed out, UNDRIP is the result of decades of work by many people, including many indigenous peoples, and I think it's important when looking at indigenous law to understand that it changes with the times, according to the circumstances of the day. We have historical legal institutions and law as well as contemporary institutions and law, and people will continue to act on legal obligations through whatever forms are available.

As a tiny example of that, some of the justice initiatives in Canada look like regular justice initiatives, but when you ask people the why of what they're doing, talking to elders and many other people, they talk about the legal obligations they're trying to fulfill to the next generation, to the land, and to one another.

I think it would be a very interesting question to take UNDRIP today through an indigenous legal process and to look at whether it allows people to act on the legal obligations from their legal orders, and whether it informs decisions, because I think it will enable people to learn and change and continue to manage their affairs.

Mr. Gary Anandasangaree: Both of you mentioned the term “aspirational”, and I think you probably used it in different contexts. What do you mean by that? Often when we hear the word “aspirational”, it's almost as though it's not doable. It's a dream and to some extent it's abstract, and while we can look in that direction, we're not going to get there.

Do you believe that UNDRIP is aspirational in that sense, or is it aspirational in the sense that it's available and we can achieve the principles in UNDRIP?

Prof. Val Napoleon: Canada has aspirations of equality and fairness that the charter has been created for, so when we think about the aspirations of Canada, it's in that way that I'm looking at the aspirations that had been identified by indigenous peoples with their laws. But we need legal, legitimate processes for figuring out how those aspirations matter in human relations, especially where there are relations of power that people are trying to sort out with one another.

Two aspects are necessary. One, we need the dream and the hope to be the best we can be, and two, we need processes through which we can act on that dream.

● (1730)

The Chair: We're at the end of our meeting. I know we would like to continue but without unanimous consent.... I think we all have other business.

To the presenters, thank you so much for enlightening us and adding to the discussion. I really appreciate your participation.

The meeting is adjourned.