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(1530)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, we'll call this meeting to order. This is the 18th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Today we're continuing our study of Bill C-25, An Act respecting the Qalipu Mi'kmaq First Nation Band Order.

Today we do have two representatives representing the Mi'kmaq First Nation Assembly of Newfoundland. We have Anne Hart, as well as Jamie Lickers. We want to thank you for coming

and taking time out of your busy schedules to join us this afternoon to speak on behalf of the assembly. We'll turn it over to you for the first ten minutes and then we'll have some questions for you.

We'll turn it over to you Ms. Hart and we'll listen to what you have to say and then we'll probably have a few questions for you.

Ms. Anne Hart (Representative, Mi'kmaq First Nation Assembly of Newfoundland): Well thank you very much for the opportunity to be here first of all and for the invitation to make a submission.

My name is Anne Hart and I am a member of the Qalipu First Nations. I applied for my membership in 2011. I was granted membership and Indian status on January 26, 2012. I'm also a member of the Mi'kmaq First Nations Assembly of Newfoundland since July 2013.

The Mi'kmaq First Nations Assembly of Newfoundland opposes the enactment of Bill C-25. While the Conservative Government claims that this bill is necessary for the finalization of the Qalipu band list and to ensure the integrity of the band, it is simply a further attempt to treat the Mi'kmaq peoples of Newfoundland differently from other status Indians in Canada and to shield the federal government and the band from liability for the mismanagement of the band enrolment process.

The assembly was formed in May 2013 as a result of concerns that applicants and band members had over the handling of the enrolment process and the evaluation of the membership applications.

The assembly is a non-profit organization which advocates for the fair and equal treatment of all Newfoundland Mi'kmaq people and for their fair evaluation of all applications for Qalipu band membership.

The assembly has currently a membership of 8,500 people which consists of three important groups; band members who have received their band membership and Indian status like myself, applicants whose applications have not yet been processed to date, and applicants whose applications for their band membership has been rejected.

The history of the struggle of the Newfoundland Mi'kmaq dates back to 1949 when the Premier of Newfoundland stated that there were no Indians in Newfoundland.

For decades, the Mi'kmaq people of Newfoundland had their existence denied and were prevented from accessing programs and services available to other first nations peoples in Canada.

In 1989 the Federation of Newfoundland Indians brought an action in federal court seeking legal recognition for the Mi'kmaq people in Newfoundland and for a declaration that Canada was discriminating against the Mi'kmaq people of Newfoundland.

Two further decades of negotiations led to the signing of an agreement with the Federation of Newfoundland Indians to recognize the Mi'kmaq people of Newfoundland and to create the Qalipu band. The agreement was signed in June of 2008.

The agreement sets out the eligibility criteria for band membership. An individual is eligible for the enrolment as a founding member of the band if the individual; is of Canadian Indian ancestry, was a member of the Newfoundland Mi'kmaq community or a descendant of such a person; if they self-identified as a Mi'kmaq on the date of recognition order, and is accepted as a member of the Mi'kmaq group of Indians of Newfoundland.

The parties received far more applications than was originally anticipated. By the application deadline of November 30, 2012, the enrolment committee had received approximately 105,000 applications. It became clear that the enrolment committee would not be able to evaluate all of these applications during the prescribed time period and much uncertainty arose as to the outstanding applications.

It is important to note that some families have as many as 300 people applying.

In July 2013 a supplementary agreement was entered into between the Federation of Newfoundland Indians and the federal government. The supplementary agreement modified the application of the eligibility criteria in important ways that made it more difficult for applicants to meet the criteria.

🕒 (1535)

The changes contained within the supplementary agreement were not ratified by the membership of the Federation of Newfoundland Indians like the agreement in principle presented in 2008.

This was a hardship for those members who applied after the formal recognition of the band and required the production of extensive additional documentation including proof of frequent visits to the Mi'kmaq communities in Newfoundland, communications with members of the Mi'kmaq group of Indians, telephone records, travel itineraries and evidence that individuals maintained a Mi'kmaq way of life prior to 2008.

This is what brings us here today to discuss Bill C-25, An Act respecting the Qalipu Mi'kmaq First Nation Band Order.

First, clause 3 of the bill allows the Governor in Council to amend the Qalipu Band Order to remove individuals from the band list therefore revoking that individual's membership and Indian status. There is no limitation on the Governor in Council's ability to exercise this power. He is not required to act on the advice of the enrollment committee. This is not acceptable and opens the process to abuse.

Additionally, this process removes the power of the Indian registrar to remove names from the Indian registry which is the process followed by other status Indians in Canada. By removing this

power from the registrar individuals whose names are removed from the Indian Register will not have access to the protest provision in the Indian Act which allows an individual to protest the removal of his or her name from the Indian Register without retaining legal counsel.

Clause 4 is similarly problematic in that it removes the legal right of an individual to sue the federal government, the band or the council for the wrongs that he or she may have suffered as a result of the mismanagement enrolment process. The provision shields the federal government, the band and its councils from any liability for gross negligence, for failing to consult, for breaching its duties to the Mi'kmaq people of Newfoundland and breaching the honour of the crown.

This clause prevents individuals from recovering damages for loss of entitlement for life decisions made in reliance on their entitlement to band membership and Indian status as well as any costs associated when preparing their membership application. Clause 4 represents the denial of fundamental legal rights guaranteed to all citizens of this country. It removes the right of individuals who have suffered harm from suing for damages.

Bill C-25 should not be enacted into law. The documentation now being requested for applicants in order to substantiate their application pose impossible hurdles for most applicants. These applicants were not notified in a timely fashion that they would require to keep and produce extensive records to prove their self-identification, community acceptance and participation in cultural activity. They are now being asked to produced phone records, credit card statements, travel itineraries, application forms, government documents and records some five years after the fact.

To now shield the federal government, the Qalipu band and its council from any liability for the mismanagement of the Qalipu enrolment process would be a fundamental denial of justice to the applicants and members who may lose their Indian status. Is the Assembly's recommendation that Bill C-25 be opposed and should not be enacted into law. Alternatively clause 3 of the bill should be struck and the normal process under the Indian Act should be used for the removal of names from the Qalipu band list and the Indian Register. This will ensure that the existing band members have meaningful access to the protest provision in the Indian Act.

(1540)

As a further alternative, and at a minimum, clause 3 of the bill should be amended to clearly outline the basis on which the Governor in Council may act to remove the name from the Qalipu band list. The wording of this clause should be revised to ensure that the Governor in Council cannot solely make the decision to remove individuals from the list.

Clause 4 should be struck in its entirety. Individuals who have been wronged by the mismanagement of the Qalipu enrolment process should have access to appropriate legal recourse. Alternatively, this clause should be revised to narrow the limitation of liability.

Thank you very much for allowing me to provide this information. I certainly will be open to questions.

The Chair: Thank you, Ms. Hart. We appreciate your opening submission.

We'll now turn to Ms. Crowder for the first round of questions.

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

Thank you, Ms. Hart, for your submission.

There were a couple of points in your submission that I wanted to clarify with you. You indicated.... Let me back up a bit.

As you're aware, last week we had the minister before the committee, seeking clarification on certain aspects of the bill. Specifically with regard to clause 3, with regard to the Governor in Council, we asked the minister and the department to clarify the process by which names would come to the Governor in Council for additional removal.

Minister Valcourt indicated to the committee that the Governor in Council would not be making unilateral decisions, and that they would be acting based only on recommendations made by the enrolment committee. Minister Valcourt confirmed that would be the case, that it would be the enrolment committee that would be making those recommendations, not the Governor in Council or the minister.

I don't know if you have any comments on that process.

Ms. Anne Hart: I'm glad to hear the decision will not be made solely by the Governor in Council. I wasn't aware of this discussion.

However, the enrolment committee has been part of the whole process from the very beginning. For the people who are holding their status cards, like me.... I have a letter stating that I am now a status Indian. I received a letter from the enrolment committee stating very clearly that I meet the criteria. So my question now would be, I guess, to the enrolment committee and certainly not to the Governor in Council, and that is, what criteria would you be making to remove my name—if it were me, for instance—from the Qalipu band list?

(1545)

Ms. Jean Crowder: You raised the issue around the protest provision. Again, my understanding is that as of the 2011 Supplemental Agreement, all applications received prior to that date are being reviewed under the criteria that has been clarified in the 2011 Supplemental Agreement.

Again, some clarification...because we're using two different pieces of language, and I know they're two different matters. My understanding, again, is that if the enrolment committee makes a decision to remove somebody's name from the band list, there is an appeal process. There's an appeals master. There is an appeals process outlined in the criteria for a member to appeal that decision to remove his or her name from the band list.

You rightly point out that the Indian Act—my colleague pointed out section 14.2—allows a protest provision. Are you suggesting there should be both the appeal process and a protest mechanism?

Ms. Anne Hart: Maybe you could respond, Jaimie.

Ms. Jaimie Lickers (Representative, Mi'kmaq First Nation Assembly of Newfoundland): I'd be happy to speak to that issue, if the committee would prefer, given that Ms. Hart is not a lawyer.

Ms. Jean Crowder: Please do, Ms. Lickers.

Ms. Jaimie Lickers: We do understand that there is a process under the agreement for the appeal of decisions. However, on this particular point, dealing with section 3, we're dealing with a limited group of individuals who have already received Indian status.

Individuals in Canada who have received Indian status have a process, under the Indian Act, whereby a certain process is followed if they're going to have their status revoked and their membership removed. When that happens, those individuals have access to the protest provision in the Indian Act.

Any differential treatment to members of the Qalipu Mi'kmaq band who are status Indians under the Indian Act today is differential treatment under the law.

Ms. Jean Crowder: This is not a question that we asked the department when they were here, have you clarified that the protest provision will not apply?

Ms. Jaimie Lickers: The protest provision could apply.

Ms. Jean Crowder: Right.

Ms. Jaimie Lickers: But, the case law under the protest provision says that the registrar cannot go behind and Order in Council.

If the registrar removes an individuals name from the Indian Registry or from a membership list, because that name has been removed from an Order in Council, recent case law says the registrar has no discretion and must remove that individuals name from the registry and from the membership list.

The protest provision, on the surface, remains available, but the case law makes it clear that any appeal of the registrars decision, if his decision is based on an Order in Council, the result is predetermined.

Ms. Jean Crowder: So what we really do need is we need clarification with regard to that particular section of the Indian Act, because at this point what I'm understanding you to say is,

there is an appeal process and that the protest provision is available but unlikely to be applied based on case law. That's what I'm understanding you to say. Am I correct?

Ms. Jaimie Lickers: Exactly.

Ms. Jean Crowder: So that's a point of clarification that we're going to require.

Ms. Jaimie Lickers: I think it's important to keep in mind that the protest provision under the Indian Act is meant to be a very informal process that an individual can access by way of writing a letter and submitting affidavit evidence and any other forms of evidence that the registrar will accept.

It's a very accessible process for individuals, as opposed to following the appeal procedure under the agreement and then having to go to either a judicial revue application or to go to court and retain council to challenge that decision. They're two distinct processes and one of them is very accessible and one of them is not.

Ms. Jean Crowder: I've got 20 seconds, I'll conclude.

(1550)

The Chair: Thanks, Ms. Crowder.

We'll turn to Mr. Strahl.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Thank you, Mr. Chair.

Thank you for coming.

I did have some questions regarding who you're representing, basically. I think you mentioned at the beginning of your comments, was it 8,000 or 9,000 members?

Ms. Anne Hart: 8,500.

Mr. Mark Strahl: 8,500, right in the middle.

How does one become a member? Is it a proactive thing, they approach you, they request to be represented by you? How did those 8,500 people come to be represented by your organization?

Ms. Anne Hart: It began with, the organization was first known as Call the Watchdog Group, then they incorporated themselves. A lot of it is by word of mouth and since the incorporation they've gotten the information out to the people who have concerns, who have put in their application, did not have their application process, or they had their application sent in and they got a rejection letter.

Mr. Mark Strahl: So, does someone take out a membership or just indicate that they would like to join your group?

I guess I'm trying to figure out...there's 101,000 applicants, 8,500 have.... just tell me how someone comes to be a member of your organization.

Ms. Anne Hart: There is an application process and there is a membership fee which covers whatever costs the assembly has to retain legal counsel or...so there is an application process.

Mr. Mark Strahl: What is the membership fee?

Ms. Anne Hart: It's $20.

Mr. Mark Strahl: Do you have a constitution and bylaws?

Ms. Anne Hart: Yes.

Mr. Mark Strahl: How are you governed?

Ms. Anne Hart: There is a constitution, by-laws, there's a board of directors. There is a webpage that's been set up so that we can share everything that's happening with the membership, so we're structured as a...we're incorporated.

Mr. Mark Strahl: When we tried to access the constitution bylaws I think there was a web problem. It was bouncing back to a donation page or something. If you could provide the committee with a copy of those constitution and bylaws—

Ms. Anne Hart: Okay.

Ms. Jaimie Lickers: Certain aspects of the organization's website are restricted to members. Unless you've paid the membership fee and submitted an application you can't access things like the constitution, the bylaws, and the legal updates.

Mr. Mark Strahl: Okay, I appreciate that.

One of the things that was interesting to me, having reviewed this file going back a ways, we had 101,000 or so, I think you said 105,000. 70,000 applications were received in the last 14 months, including approximately 46,000 in the last three months prior to the application deadline.

Why do you think nearly 50%, or whatever it is, there such a spike in applications from your perspective in the last three months of a multi-year enrolment process?

Ms. Anne Hart: As far as numbers go, I personally can't give you an answer as to why it's 105,000, but today we're actually speaking about this and how many of those 105,000 is going to be affected by this Bill C-25.

Mr. Mark Strahl: Right, and I think the reason there was a supplementary agreement in 2013 is because they were expecting 10,000 people to apply and 101,000 did, and they realized that while they kept the eligibility the same, they needed to change the requirement for proof of that and all the connections to that.

Yes, we are discussing the bill and the reason the bill has come forward is because of that 10 times number that they were expecting. Does your organization believe that 101,000 applications is a reasonable figure considering the government and the band were only expecting 8,000 to 12,000?

Ms. Anne Hart: Again, I'm going to say it was as a direct result of this mismanagement of the enrolment process, because the agreement that was signed in 2008—if you look at the agreement in principle that was submitted and was signed with the Federation of Newfoundland Indians and the federal government, the criteria in that was very, very open. It was very open.

When the supplementary agreement was put in place, nobody was even aware it was coming down the road. They did put in criteria, but at that time, you had the numbers then based on the 2008 agreement, and that's what everybody was going by. It's only in this last submission that people were having to put in their telephone bills, trying to track down travel itinerary, government forms, income taxes, and all that. That was never part of the requirement as part of the agreement in principle.

(1555)

Mr. Mark Strahl: I think that when we had the FNI here last week and the minister, both indicated that while keeping the eligibility the same as a result of that huge number, it is why they needed that supplementary agreement to ensure that the integrity of the band was protected. If you have 101,000 applicants, I don't know how many would be successful, but it represents 11% of first nations across the country and certainly I think the first nations themselves—that wasn't what the 2008 agreement intended.

I guess I'm struggling a little. I understand what you're saying, but at the same time, what should have been the response, then, to 101,000 applications, if not something to protect the integrity of the first nations?

Ms. Anne Hart: I believe that when they brought the agreement in principle to the membership at the very beginning, when it was signed, it was ratified. It's now five years later. We had government officials sitting around the table, we had enrolment committee members who knew what the criteria was. It should have been brought forward long before now. It should not have taken five years.

When they say 24,000 applications come in up to November 2009, something should have been brought forward at that point instead of letting it go until now, in 2013, only to have a supplementary agreement put in place to cut back the numbers, to make the criteria a little bit more stringent, to see if we can get some of the applications rejected, because this supplementary agreement was never ratified. We were never consulted. Nobody in the community, none of the

memberships, none of the band chiefs came to their membership and asked if this could be ratified.

The Chair: Thank you, Ms. Hart.

We'll turn to Ms. Bennett now.

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

I guess what I'm hearing from you is you think this is an issue that would be more appropriate for the court to decide, which would have the benefit of the facts of a particular case or class of cases.

Ms. Anne Hart: I think that there has to be a decision made on what it is that they're looking for as far as criteria. The problem began back when the agreement in principle began because, as I said, it was open. I think the enrolment process was flawed because of the fact that there was no real criteria put in the agreement of principle. As long as people showed that they lived in a Mi'kmaq community, there was no stipulation that they had to be doing Mi'kmaq culture, none of that. They didn't have to prove any of that. They lived in a Mi'kmaq community. They showed their ancestry line and basically that was it.

Hon. Carolyn Bennett: So the government says that the supplemental agreement doesn't change the enrolment criteria, but they've changed the guidelines and that really changes the interpretation of those criteria.

Ms. Anne Hart: It does.

Hon. Carolyn Bennett: And it means that certain people who were previously granted status and added to the list might lose that status.

Ms. Anne Hart: Exactly.

Hon. Carolyn Bennett: So it also means—and it was quite interesting to hear that the band hadn't even asked for this—that for the individuals who had incurred significant costs, perhaps flying back and forth to Newfoundland, that the bill would also remove any ability of the individuals to be reimbursed for this cost, even though a court could find that the government was at fault, in terms of this confusion.

(1600)

Ms. Anne Hart: Yes.

Hon. Carolyn Bennett: And that they've been erroneously removed from the list.

Ms. Anne Hart: Yes.

Hon. Carolyn Bennett: In fact—

Ms. Anne Hart: And the liability is something that should be decided by the courts. Any liabilities that are there should be decided by the court, not by an enrolment committee, not by anyone else.

Hon. Carolyn Bennett: So it seems that the purpose of the bill is to insulate the government—

Ms. Anne Hart: Yes.

Hon. Carolyn Bennett: —from the legal action it is already anticipating. Is that correct?

Ms. Anne Hart: Yes.

Hon. Carolyn Bennett: Is that what you see this bill trying to do?

Ms. Anne Hart: Yes, and taking the rights away from those who hold a card right now.

I and the committee, the assembly, and other people in my community who I've spoken and I've spoken to many, they feel that that right is being taken away from them, but they're also not being told about what's going on. With the supplementary agreement, nobody knew it was coming. Nobody.

Hon. Carolyn Bennett: When we heard from the federation last week and the band, they said that they hadn't asked for this indemnification, and so clause 4, we see, is purely of the government's...what was portrayed as an agreement between the band and the Government of Canada, actually this clause, in terms of the indemnification, wasn't even asked for by the band, and they seemed surprised by it.

So I guess if we go back to the Minister'stestimony where he suggested that the Governor-in-Council doesn't have the express authority to remove names from the schedule and that this legislation is required to provide the Governor-in-Council with that authority, it sounds like the Governor-in-Council has already amended...can add names, right, to the membership list because of section 73.(3) of the Indian Act.

So what is the additional statutory authority required by the Governor-in-Council to remove names from the Qalipu First Nation band order, and do you think that the real purpose of the bill is to insulate the government from liability and not really to implement the agreement or the supplemental agreement?

What do they really need and what would you need to get this fixed in that it was such a botch-up? How do you fix it?

Ms. Anne Hart: How do you fix it? Well, first, what they're recommending in here is giving the power to the governor in council. Under the Indian Act the Indian Registrar has that power to

remove or add names and that is the same across Canada. So why is someone else receiving the power for the Mi'kmaq people of Newfoundland?

My concern is that the power has been taken away from the registrar and given over to the governor in council to be able to do that duty. But there's nothing in there limiting....I just understood that they're going to be going on the advice of the enrollment committee. But we're concerned that it is also an attempt to reduce numbers, because there's no other way to reduce numbers. As well, we believe the supplementary agreement was introduced to do the same thing. So this is another way to take the people who have their cards and take their cards away from them.

I believe that 24,876 people is probably still too many for the band themselves. If we have 105,000 applications, we only have 24,876 that received their cards. So we still have a substantial number of people just standing out there waiting to be processed and I don't believe they will be.

(1605)

The Chair: Thank you.

Now we'll turn to Mr. Seeback for the next questions.

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

Based on what you've said, Ms. Hart, I think your group is composed of people who's applications have been rejected, not processed, and what I'm calling, approved, but concerned. Would that be the three people in there?

Ms. Anne Hart: No, it's in the agreement.

Mr. Kyle Seeback: Do you have any idea of the numbers of that? Is it an equal distribution or you sort of have no idea and don't keep track of it?

Ms. Anne Hart: I don't have those numbers.

Mr. Kyle Seeback: That's fine.

One of the comments you made is you said the process was very open. There was a mismanagement of the process. I think that's what you've sort of intimated with the process early on. I take it by that, you accept that there shouldn't be 101,000 people who are eligible for first nation status with the Qalipu Mi'kmaq?

Ms. Anne Hart: That's, unfortunately, not for me to decide, but based on what was presented to us to ratify after the agreement-in-principle was signed, it was very opened. What we're concerned about now is that everything that's being done is about reducing numbers.

Mr. Kyle Seeback: I understand that, but you said it was very open and it should have been more stringent. Those are directly what you've said today.

Ms. Anne Hart: Yes.

Mr. Kyle Seeback: So if you're saying it was too open and should have been more stringent, by definition you're also saying that perhaps it allows far too many people to apply. Do you think this band should be one-tenth the size of all first nation communities in Canada?

Ms. Anne Hart: No, I don't have an opinion on that.

What I will say is that yes, it was open, but it wasn't done fairly. That's the other thing, too. The process wasn't fair—

Mr. Kyle Seeback: The initial process wasn't fair?

Ms. Anne Hart: The initial process on the agreement-in principle and I'll give you an example. When I made my application, I was the main applicant. I had brothers and sisters who applied under me. They received all of their documentation, but I did not, although I was the main applicant and all of their applications depended on my documentation.

Mr. Kyle Seeback: So you didn't receive what documentation?

Ms. Anne Hart: I didn't receive the document stating that I met the criteria, but they did.

Mr. Kyle Seeback: I thought you said you obtained—

Ms. Anne Hart: I did, but it was after the fact and I had to call and demand why I didn't receive my letter and when I called, my letter was not mailed to me. My letter was dropped in a box at my house with no stamp on. When I got in my house that evening I received a call and the phone caller said “You should keep your mouth shut now. You have your letter”.

So I dial star-69 to see who the caller was and the number was blocked. That's not the first instance that we've experienced in our community.

Mr. Kyle Seeback: You've said that it's very open, it should have been more stringent. I know you're not acknowledging or saying you don't have an opinion that the number is too large, but I think what you've suggested is that's what you're thinking. If we look at that, the process now will re-evaluate these applications on the basis of the supplementary agreement.

Wouldn't you agree that it's only fair that every applicant be treated the same? They can't just ignore people who have been granted status under the original agreement. It wouldn't be fair to all applicants if you said “Well those people are fine, but these other people here, we're going to review your applications”. Isn't it an issue of fairness that if it's happened everyone should be under the same criteria?

(1610)

Ms. Anne Hart: What I'm saying is that the agreement in principle that was signed.... I think prior to that happening, there should have been more consultations done within the community so that the criteria should have been set from get go. From the very beginning.

Mr. Kyle Seeback: In the original?

Ms. Anne Hart: In the original agreement. Because that's what opened up this Pandora's box right now. Because everybody applied based on the criteria which was very open, but you still had criteria to meet under the agreement in principle.We have a signed contract with the Government of Canada.

And now we're introducing a supplementary agreement. But it took five years to do that. That's our concern.

Mr. Kyle Seeback: So if it had been done—

Ms. Anne Hart: This should have been identified long before.

Mr. Kyle Seeback: —two years later, you wouldn't be having the concerns you're here at the committee with?

Ms. Anne Hart: It's about the bill that we're here about because it's taking away the right of the Mi'kmaq people of Newfoundland. It's giving someone the authority to take their name off of a list. I carry a status card. My concern, like many in our assembly, is that I'm entitled to that. I feel very strongly I'm entitled to that.

I practice my culture, but it's not about the culture. It's not about whether I hunt and fish, it's not about the money. It's about my recognition that I've been looking for all of my life. And someone is going to take that away.

Mr. Kyle Seeback: Well not necessarily. That's not a foregone—you're saying it like it's a foregone—

Ms. Anne Hart: No, but based on this bill, it could happen.

Mr. Kyle Seeback: Those were my questions.

The Chair: Thank you.

We're going to turn to Ms. Crowder now for the follow-up questions.

Ms. Jean Crowder: Thanks, Mr. Chair.

I think you probably are aware that the bill that's before the committee has no scope to deal with enrollment criteria. This bill is simply a bill that indicates that it gives a governor in council the ability, based on recommendations by the Royal Enrollment committee, to add or remove people's names from the list.

The parliamentary rules don't allow us engage in matters outside of the spirit and intent of the bill. So it's a challenge for us and probably not appropriate for us to talk about membership criteria because that membership criteria was developed initially by the community. And I just wanted to touch on that just for one moment.

My understanding—and I think this probably gets to the heart of this—is that the rationale behind the enrollment criteria and in the subsequent clarification of it was based on the fact that parties to the agreement were guided by the Supreme Court of Canada's decision in the R v. Powley. And there the court recognized that belonging to an aboriginal group requires at least three elements: aboriginal ancestry, self-identification, and acceptance by the group. The Supreme Court stressed that self-identification and acceptance could not be of recent vintage, this former the basis for the criteria set out in paragraph 4.1(d)(i) of the agreement. So the parties intended that was the criteria used for acceptance.

So I think that the challenge for people was that they have the initial eligibility and enrolment process—and you're right, there is a lack of clarity about that initial eligibility enrolment process under section 4.1 eligibility criteria. And my understanding is that in discussion with all parties, that resulted in the supplemental agreement in order to clarify membership criteria based on the Powley decision. Is that your understanding of it as well?

Ms. Anne Hart: Yes and the thing is that with the mismanagement of the process, there's a legal liability there as far as we're concerned. Because we didn't set the criteria, we didn't set anything in place. All we were presented with was the agreement after it was signed basically. This is how it's going to be right?

So someone has got to liable for the mismanagement of the process.

Ms. Jean Crowder: Ms. Hart, I'm not a lawyer either, but perhaps Ms. Lickers can comment on this particular piece. My understanding of it is that what section 4 does is prevent people from suing for compensation, but it doesn't prevent people from taking the government to court for whatever else they may feel has been erroneous in this agreement.

(1615)

Ms. Jaimie Lickers: That is yet to be determined. It's not explicit in the bill. Right now—

Ms. Jean Crowder: It isn't explicit but it's not explicit either that people are prevented from going to court.

Ms. Jaimie Lickers: No, it's not explicit that people are prevented from going to court. If you were looking for declaratory relief, I'm sure you could go to court. Not a lot of people can afford to go to court simply for declaratory relief.

Ms. Jean Crowder: We're in a position where many first nations are disadvantaged because they can't go to court on any number of matters on which they feel the government has been bargaining in less than good faith. There are all kinds of matters out there, and I would agree that the cancellation of the fund that used to be available to allow people to do that is not a good thing, but I just wanted to make the point that there's nothing explicitly in this piece of legislation under clause 4 that prevents people from taking the government to court. My understanding is it just limits their ability to sue for compensation.

Ms. Jaimie Lickers: Right, to sue for even just a basic recovery of the cost that they incurred in preparing an application in reliance on the original critiera which was then modified without consultation and without ratification under the agreement—it brings into question whether somebody could even recover costs if they were successful in taking the federal government or the band or council to court for anything other than damages, declaratory relief, judicial review application. It's questionable whether that individual, if successful, would even be reimbursed for any portion of the cost.

Ms. Jean Crowder: My understanding of the way this clause reads is they can't seek compensation or damages because their name was omitted or removed from the list, but it doesn't prevent them from going to court on other matters with regard to that as long as they're not seeking compensation specifically. Again, I'm not a lawyer, but the way I'm reading this is if it's not about compensation for damages for having their name removed. They could go to court for other matters with regard to membership as long as they weren't seeking damages or compensation.

Ms. Jaimie Lickers: I'm afraid I might be missing your point.

Ms. Jean Crowder: I guess the point I'm making is they can still go to court for matters with regard to membership. It's just that they can't go to court to seek compensation or damages—

Ms. Jaimie Lickers: —which, in my view, would be the primary purpose for goign to court.

Ms. Jean Crowder: The could be asking for reinstatement or other matters related to membership that aren't specifically related to damages.

Ms. Jaimie Lickers: I suppose, yes, they could seek reinstatement.

Ms. Jean Crowder: Thanks, Mr. Chair.

The Chair: Mr. Strahl, we'll turn to you.

Mr. Mark Strahl: I'm good, Mr. Chair.

The Chair: Were there any additional questions on which anybody needed clarification?

Not seeing any, we want to thank Ms. Hart and Ms. Lickers for coming. We appreciate it has taken time out of your busy schedules. We do appreciate the fact that you've made yourselves available for our committee.

We will continue. Committee members, we'll move into committee business shortly, but we'll suspend for a few minutes to again thank our guests and dismiss them.

The meeting is suspended.

[Proceedings continue in camera]