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FIRST NATIONS FINANCIAL TRANSPARENCY BILL

Third Reading of Bill C-27—Motion in Amendment Negatived—Vote Deferred

Speech by:

The Honourable Claudette Tardif

Monday, March 25, 2013

THE SENATE

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FIRST NATIONS FINANCIAL TRANSPARENCY BILL

THIRD READING—MOTION IN AMENDMENT NEGATIVED—VOTE DEFERRED

Hon. Claudette Tardif (Deputy Leader of the Opposition): Honourable senators, I would like to add to the debate by reading into the record excerpts of a letter sent by the Sampson Cree Nation of Hobbema, Alberta, to the Standing Senate Committee on Aboriginal Peoples.

Let me begin:

> In general terms the Samson Cree Nation... does not oppose fair and effective financial transparency requirements for First Nations and Chiefs and Councils. Indeed, it is our current practice to be transparent with our citizens in our own financial affairs, including the salaries of Chiefs and Councillors. If we had been approached by the Government of Canada... for input we would have participated closely in the development of Bill C-27.
>
> Our two broad objections to Bill C-27 flow from the lack of opportunity for meaningful First Nation input. To begin with, the frequency with which Canada disregards the need for First Nation involvement in the development of legislation for First Nations is deeply troubling and is seriously undermining Crown-First Nation relations.Canada has a constitutional duty to meaningfully consult with First Nations, demonstrably integrate our concerns into Crown actions, and to accommodate our constitutionally enshrined Treaty and Aboriginal rights. No attempt was made to consult and accommodate with respect to Bill C-27. Canada has to stop dealing with our Treaty rights and the duty to consult as administrative inconveniences.
>
> Further, Canada has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples*, nonetheless Canada has entirely disregarded the *Declaration* with respect to a number of pieces of legislation regarding First Nations, including Bill C-27. Article 19 of the *Declaration* states:
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> > States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> It is difficult to understand how "free, prior and informed consent" can be achieved without any genuine tempt at consultation....
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> Consultation is not an empty constitutional requirement — genuine consultation is supposed to ensure that contemplated Crown action, including the development of legislation, occurs in a manner that respects First Nations Treaty and Aboriginal rights, including our inherent right of self-government, and that any new legislation solves problems rather than creating new ones. Canada's consistent failure to consult with First Nations on legislation, including Bill C-27, is becoming a very troubling trend in Canada's approach to the development of new First Nation legislation. The lack of consultation with First Nations on Bill C-27 will undermine the effective implementation of the law and open the way for legal challenges to the validity of the legislation. In this sense, at least, it will make things worse, not better.
>
> The duty to consult with First Nations can arise with respect to the development of new legislation by the Crown that has the potential to impact or infringe Treaty and Aboriginal Rights. Satisfaction of the duty to consult is a constitutional imperative which is a precondition to the valid enactment of legislation, in the same way that legislation must comply with the *Charter of Rights and Freedoms* or any other requirement enshrined in the Constitution. In the *Tsuu T'ina* case, the Alberta Court of Appeal commented that Crown officials charged with developing legislation can be subject to the duty to consult.
>
> The practical importance of consultation is demonstrated by the reality that the issues identified below with Bill C-27 could have been addressed successfully through genuine effort consultation with First Nations, had Canada made any effort to do so....
>
> The primary purpose of financial transparency legislation should be to ensure the accountability of First Nation governments, with respect to their *functions as governments,* especially to First Nation citizens. Some aspects of Bill C-27 are problematic because they may reach well beyond ensuring the accountability of First Nations' governments and reach into the businesses and economic endeavours of First Nations.
>
> To begin with, s.3 requires a broad range of entities of unspecified and varying degrees of association with a First Nation to be included in the financial disclosure requirements applicable to the First Nation itself, including "a corporation, partnership, a joint venture or any other unincorporated association or organization." Bill C-27 seems to make no distinction between a fully owned First Nation commercial entity and one in which the First Nation has a minor interest. Nor does the legislation distinguish between arm's length investments or corporations operated by blind trusts or boards independent from the First Nation Chiefs and Councils, and those commercial entities entirely and directly controlled by First Nations.
>
> Moreover, s. 11 says that "any person", whether they are a First Nation citizen or not, can make an application compelling a First Nation or its commercial entities to release financial information. These aspects of Bill C-27 raise a number of difficult questions and issues that had to be addressed in the course of developing the legislation in consultation with First Nations:

1. Many First Nations have created structures for their commercial entities that ensure those entities are governed by outside board of directors, and/or trustees, at arm's length from Chief and Council and/or the First Nation. This ensures that business decisions will be made without political influence or interference, that those charged with running these businesses are accountable for the success or failure of the commercial ventures in question, and that revenues from commercial ventures are used for charitable purposes that benefit the First Nation community as a whole. Bill C-27 needs to be clearer at least with respect to:

a. What degree of ownership in and/or control over a commercial entity by First Nation will engage disclosure requirements?

b. Is the Bill intended to capture the activities and financial information of charities?

c. If a commercial entity is privately held, the disclosure of otherwise confidential business information harm the interests of the company, partnership or joint venture. This is why access to information legislation contains exemptions for private commercial interests. Why aren't such considerations a factor under Bill C-27? If commercial harm does result, what are the responsibilities of the Crown for such harm?

d. Has Canada considered whether the disclosure requirements will put a chill on third parties investing or participating as partners in commercial ventures with First Nations?

e. What are the legal implications of the disclosure requirements for trustees overseeing First Nation commercial entities or for the fiduciary duties of directors and officers of First Nation commercial entities?

2. Section 11 places no apparent restrictions on the motivation or purpose of a court application brought by "any person" to force financial disclosure by a First Nation or its commercial entities. It is conceivable that this section could be used to do an end run around legitimate exceptions to access to information requests or simply to gain a competitive advantage over a First Nation commercial venture. Interest groups and political organizations might also use s. 11 for unintended purposed. This does not seem to have been thought through — why not?

• (2020)

The "any person" portion of s. 11 is troubling for other reasons. To our knowledge, a First Nation citizen in Alberta cannot bring a legislative or court application in another province to compel the disclosure of financial information from another government. First Nations governments should be accountable to our own citizens, and/or to the Government of Canada for any funds transferred to a First Nation government, for programs, education, healthcare or infrastructure. It should not be open to "any person", for any apparent purpose or motivation, to engage a First Nation in a costly and time consuming court procedure regarding the disclosure of financial information. This section potentially declares an open season on legal proceedings of this nature against First Nations.

Samson is equally concerned that the extension of financial disclosure requirements to commercial entities in which a First Nation has an interest will also be unfair for other reasons. Samson currently owns Peace Hills Trust, a small but successful privately held banking and lending institution. Samson also owns or has an interest in a long list of other commercial ventures, including but not limited to a casino, resort, oil and gas development, and a construction and trucking company. The more successful a First Nation is, the more diverse our commercial interests are and so the more onerous the reporting requirements will become. Our accounting firm informs us that considerable additional costs will likely be incurred as a result of Bill C-27, particularly as a result of the broad definition of ""entity". Further, there may well be unique legal requirements already governing financial information for our banking, gaming and oil and gas businesses that might conflict with the disclosure requirements in Bill C-27. Canada has not studied these issues or the downloaded costs of identifying and addressing these legal issues. These costs have apparently been offloaded to any commercial entity that has some unspecified degree of First Nation ownership or control.

Samson is also concerned that the inclusion of commercial ventures in the legislation is a poorly cloaked measure that is actually intended to enable Canada to find new justifications for reducing funding to First Nation governments. If this is indeed an intended purpose of the legislation then the Government of Canada should be forthright about this and engage in open discussion about the issue of so-called First Nations' "own-source revenue". The honour of the Crown requires that Canada act in good faith and without hidden agendas...

Section 13 of Bill C-27 is very problematic for both legal and practical reasons. The internal financial decisions and affairs of a First Nation go to the core of our inherent right of self-government. This does not mean that clear, fair and ameliorative disclosure requirements are not legitimate, but this is not what is imposed by Bill C-27. Instead, the unstructured discretionary powers granted to the Minister in s. 13 have no clear ameliorative purpose and could, as drafted, legitimately be used in a broad range of circumstances, in arbitrary and varying degrees and without any requirement to ensure consistency, promote a positive outcome, or respect fairness.

In the *Adams* case, the Supreme Court of Canada strongly cautioned against unstructured, discretionary regimes:

In light of the Crown's unique fiduciary obligations toward Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary, administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific

criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights.

First Nation funding is inextricably related to core aspects of our right of self-government and critically important to fulfillment of key terms of Treaty No. 6, including in particular the promises in the Treaty regarding healthcare services and education. Under the unstructured discretionary regime of Bill C-27, the Minister could suspend the flow of funding or terminate funding agreements all together which relate to the Treaty promises regarding healthcare and education. These are only two of the most obvious treaty obligations potentially impacted by the Minister's s. 13 powers. There was no consultation about the potential impacts of the Minister's s. 13 powers on our Treaty rights to healthcare services and education, among others.

Practical issues also arise from s. 13. Under the current system, which is administered by way of legally binding funding agreements between First Nations and Canada, there is an imperfect but at least somewhat structured system for addressing financial mismanagement. First, a general assessment is conducted with the First Nation to identify the issues that have to be addressed.

Could I ask for five minutes, please?

Hon. Senators: Agreed.

Senator Tardif: I will continue:

The First Nation is then given a window of opportunity to develop and implement a management action plan to remedy those issues, failing which a co-manager is put in place to assist the First Nation with correcting its financial issues. In the worst case scenarios, where co-management has failed, a third party manager is appointed to control the First Nation's finances until the situation is remedied. This approach, while in need of refinement and a more consistent application from region to region, is at least measured, more or less reasonable, and usually fair — and it works more often than not. Most importantly, it ensures that funding for community health services, daycares, schools and other important services, many of which are Treaty obligations, are not disrupted or stopped all together while financial management issues are being addressed. Why did Canada toss this balanced approach, with its ameliorative objectives, out the window and replace it with sweeping and unstructured ministerial power? No explanation has been provided and no assessment of the potential impacts of the Minister's new discretionary powers on Canada's fiduciary and Treaty obligations to First Nations.

Sincerely,

Chief Marvin Yellowbird,

Samson Cree Nation.

Honourable senators, as you can see, for all of the reasons stated in the letter which I have just read and for all the other reasons stated in the submissions and statements we have heard this evening, I certainly support, as do colleagues on this side, Senator Dyck's motion in amendment that Bill C-27 be not now read a third time but that it be read a third time this day six months hence.