HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 004 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Thursday, November 21, 2013

Chair

Mr. Chris Warkentin

Standing Committee on Aboriginal Affairs and Northern Development

Thursday, November 21, 2013

● (1100)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): We'll call this meeting to order.

This is the fourth meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Today we are continuing our review of Bill C-9.

With us today we have witnesses who have been asked for. We have the pleasure of having Brenda Kustra, who is from the Department of Indian Affairs and Northern Development, and we have Tom Vincent, who is from the Department of Justice.

We want to thank you for being here. We will turn to you if there are questions with regard to the legislation or the amendments that are being proposed. We thank you for being here.

Colleagues, it is my intention to move directly into the clause-by-clause consideration. I'm hopeful that everybody has the information they need in front of them, but we'll begin with the clause-by-clause consideration.

As is the practice of all committees, the short title will be deferred to the end of the consideration of the bill. We'll move immediately to clause 2.

Not seeing anybody seeking to move an amendment, I shall call the question.

(Clause 2 agreed to)

The Chair: There is an amendment being proposed for clause 3, so I turn to Ms. Jones.

Welcome here.

(On clause 3—*Order*)

Ms. Yvonne Jones (Labrador, Lib.): Thank you, Mr. Chair.

We propose the amendment to clause 3 for a couple of reasons. First of all, we feel that the level of feedback received from first nations consultations has been uneven across the country. In Ontario and Quebec, we feel that little or no feedback has been obtained.

The AFN regional chief, Jody Wilson, when she represented the AFN before the Senate on this bill, stated:

> In terms of clauses 3(1)(b) and (c), I believe that if those clauses remain in the bill, the consultation of which you are asking for clarity and the depth of consultation you are seeking would be greatly increased if those clauses remained, or the obligations would be greatly increased if those clauses remain in this bill.

She went on to say:

> If those clauses are removed, it is simpler. The bills become simpler and the consultation would not be required in that this is a First Nations-led initiative and it is entirely optional, which it is not right now.

Also, the Assembly of Manitoba Chiefs, one of the two first nations organizations that initiated the process behind this bill's development, as I know you are already very much aware, is now opposed.

While they would still have concerns, the chief told the committee last week that an amendment like this, restoring the true opt-in nature of the bill and removing that broad discretion of the minister, would make the bill more palatable. That is the crux of what we've been getting as feedback from first nations people.

I want to urge members at the table today to support the amendment and to allow this bill to be seen as a positive piece of legislation by first nations, rather than another imposition of legislation that they did not fully agree to.

That's the purpose of our amendment today.

● (1105)

The Chair: Thank you, Ms. Jones.

Colleagues, I want you to be aware that the amendment Liberal 1 also applies to Liberal 2, as they are consequential to one another.

We'll turn to Mr. Strahl and then Ms. Crowder.

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

I think it's important that we oppose this amendment for the reason that there is already a power for the minister. This is not a new power for the minister to restore recognized leadership in a community in rare and exceptional circumstances. That power exists already under the Indian Act in subsection 74(1). That allows the minister, whenever he deems it advisable for the good government of a band, to remove them from a custom code and place them back into the Indian Act process for elections.

If this clause is removed, the effect would be to continue to allow the minister to have the ability to move a first nation with prolonged leadership issues back into the Indian Act process, but it would not allow him to move them into this improved, more robust system that Bill C-9 proposes.

As was said in testimony, as we pointed out, this power to remove a first nation from their custom code when there's been an ongoing leadership dispute has only been used three times—twice under the Liberals and once under our government—and then it was done only when every other option, every other avenue, had been closed, where there was just no hope of resolution. The ministers of the day, under both the Liberal and Conservative governments, have acted in the best interests of community members. This is a rarely used provision, but we believe it is necessary because we believe that members of first nations who are experiencing a prolonged leadership dispute should come under this improved system, rather than being forced back under the Indian Act election system, which is a power that would be retained even if these clauses were removed from this bill.

The Chair: Ms. Crowder.

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

The NDP will be supporting this proposed amendment for a couple of reasons.

First of all, it's interesting to hear the parliamentary secretary talk about the flaws in the current Indian Act. This was a real opportunity to deal with some of the flaws in the Indian Act. This simply doesn't do it. What we are doing is continuing the ability of the minister to interfere.

I want to refer to a couple of documents.

The Assembly of First Nations provided a briefing document to committee members, and in their document they indicate that:

> In choosing and designing mechanisms for the fulfillment of this authority, care needs to be taken that new barriers or new oversight mechanisms are not being created, further vesting control in the office of the Minister of Aboriginal Affairs and Northern Development.

When Chief Nepinak came before the committee, in his summary statement he said:

> The proposed legislation is simply an addition to the Indian Act, citing the same authority and the same definitions, granting broad additional powers and discretion to the Minister and his office. The legislation mingles only one recommended change from the AMC and the illusion of another and the resultant product is another piece of federal government owned legislation that perpetuates Canada's self-proclaimed authority and chips away the rights of First Nations.

In his testimony he specifically dealt with the offending piece and indicated this:

> This authority defeats the objectives of the AMC recommendation that first nations retain the right to opt in. The clause would allow the minister to subjugate those bands that have previously opted out of the Indian Act to custom election procedures.

Then he goes on, and he does indicate a major concern:

> "Protracted leadership dispute" is not a defined term and leaves broad discretion to the minister.

And he reiterates that the AMC did not make any such recommendation.

I also want to point out another problem. Subclause 3(1) provides the condition under which the minister may choose to add a first nation to the schedule, after which time that first nation would hold its election under this act. What that section requires is a band council resolution, but when you refer to clause 42, there's a completely different and more onerous process to have a first nation remove itself from this process. You wonder why you can get in so easily, but you take so much more difficulty in getting out. This whole notion of opt-in and being in control only seems to be a control issue when you actually try to get in, not when you try to get out.

I would urge members to support this amendment because it would deal with a number of the criticisms that did arise. As Grand Chief Nepinak pointed out, and as others have pointed out, this was not part of the recommendation that came out of the consultation process. If the government wants to indicate it is truly committed to a consultation process, it will actually listen to the recommendations that come forward from the groups that did the consultation. I would suggest we support this amendment.

● (1110)

The Chair: Not seeing any additional speakers on the Liberal amendment, we'll go to a vote. This is on amendment one, but it applies by extension to amendment two as well.

(Amendment negatived [See *Minutes of Proceedings*])

(Clause 3 agreed to)

The Chair: Colleagues, because amendment Liberal-2 was defeated, I will now ask a question—namely, to ask if we can proceed by moving from clauses 4 to 41 inclusively, proceed on that basis, and then have people speak to it.

Ms. Crowder.

Ms. Jean Crowder: Yes, we agree to do that. But I want to speak to a couple of specific clauses, if you'll just give me a moment to organize my papers.

The Chair: Yes.

Ms. Jean Crowder: I want to speak to clause 24. This particular clause says "the electoral officer must conduct a draw to break the tie".

We don't support that clause, because I would say that what needs to happen is the government needs to work with first nations to determine an appropriate method to break a tie. Some have characterized it as flipping a coin. The first nations have represented that this is not a position they support.

There are other clauses that we don't support: clauses 30, 31, 32, 33, 34, and 35, in a section dealing with contested elections and referring it to the court system. In numerous documents, including proposals that came forward from AMC and the previous Senate committee study, there was a very strong recommendation that there be an independent process set up that could oversee contested elections.

There's concern that by referring it to the courts it will add additional costs for first nations, and in fact may deter people who rightly have a grievance from pursuing their grievance because they're forced into the court system. At various levels of government there are other mechanisms for complaints to be filed. For us, it's Elections Canada, an arm's-length independent process. Why wouldn't first nations have access to the same kinds of mechanisms?

So we don't support that particular section.

Was clause 41 also on this, with regard to regulations?

The Chair: No. We'll only go to—

Ms. Jean Crowder: Okay.

So those are the clauses we're opposing, and we're fine if we want to go on division on this.

The Chair: What I will do, then, is something different from what I had first proposed. Having now understood what you're indicating, I'd prefer to vote on clauses 4 to 23 first.

Ms. Jean Crowder: Okay.

The Chair: I'm not seeing any additional speakers on clauses 4 to 23, so we'll go to a vote.

(Clauses 4 to 23 inclusive agreed to)

The Chair: Clause 24 has been spoken to already. Not seeing any additional speakers, we'll go to a vote.

(Clause 24 agreed to)

The Chair: Again, not seeing any speakers, we'll go to a vote.

(Clauses 25 to 29 inclusive agreed to)

The Chair: Ms. Crowder indicated that clauses 30 through 35 were issues, so we'll vote on them inclusively.

(Clauses 30 to 35 inclusive agreed to)

The Chair: We'll vote on clauses 36 to 40, and then we have a proposed amendment to add a new clause.

● (1115)

Ms. Jean Crowder: I want to speak to clause 41.

The Chair: Okay. We'll do that.

(Clauses 36 to 40 inclusive agreed to)

(On clause 41—*Regulations*)

The Chair: We'll now—

Ms. Jean Crowder: I'd like to speak to clause 41 before we do the amendment.

The Chair: Ms. Crowder, we'll have you speak to 41.

Ms. Jean Crowder: Mr. Chair, may I direct a question to the department officials?

The Chair: Absolutely.

Ms. Jean Crowder: Clause 41 deals with the fact that regulations may be made with respect to elections. There is no requirement in the legislation to set up a process for working with first nations in the development of the regulations. Can you tell me if there is a standard practice in the department, when regulations are being contemplated, for consulting with first nations and what that practice would look like?

Ms. Brenda Kustra (Director General, Governance Branch, Department of Indian Affairs and Northern Development): I don't believe there is a standard practice, but I believe that Minister Valcourt, when he was addressing the standing committee a couple of weeks ago, did make a commitment that we would work with first nations partners in the development of regulations. I believe he also specifically referenced work that would be undertaken with the Atlantic Policy Congress and other first nations partners across the country that would be willing to work on regulatory development.

Ms. Jean Crowder: I'd like to speak to clause 41.

I'm afraid that's cold comfort. Just the history on the development of this piece of legislation certainly does not give me any degree of confidence that the government will work in good faith with first nations with regard to developing the regulations.

Working with first nations is a very ill-defined mechanism. In the legislation that's before us there was a process set up and resources were provided to the APC and AMC to conduct consultations, yet the recommendations that came forward are only partially reflected in the legislation, and additional requirements were inserted into the legislation without the consultation process.

We will be opposing clause 41, based on the fact that there is no adequate process, resources, framework outlined for meaningful consultation with first nations. As Grand Chief Nepinak pointed out, free, prior, and informed consent is an important element when you're developing regulations and legislation that is going to have far-ranging impact.

When you look at what could be included under these regulatory frameworks, there are appointments, a certification process, the identification of electors; there are manners in which candidates may be nominated and so on. This will have very serious impacts on the ability of first nations to conduct elections and on what will be required. Without their free, prior, and informed consent in developing these regulations, you are going to have regulations that may not meet the needs or meet the test around inherent rights.

We will be opposing this clause.

The Chair: Not seeing any—pardon me. Mr. Strahl.

Mr. Mark Strahl: I would again point out the opt-in nature of this legislation. If the minister would go down the road that Ms. Crowder suggests he could or may, I would suspect there would be no first nation that would choose to opt in.

These regulations will be made in consultation with those organizations and first nations leaders who have indicated they support this bill and want to see it implemented. Obviously we will be working with them. If they are unhappy with the regulations that are developed, there is nothing to compel them to opt in to this system.

● (1120)

The Chair: Ms. Crowder.

Ms. Jean Crowder: Except for paragraphs 3(1)(b) and (c), which then gives the minister the authority to require first nations to be covered under this piece of legislation.

Certainly many first nations will choose to opt in or not, but there will be first nations that are forced under this legislation, so that argument simply doesn't fly.

If the government is to operate in good faith, they would indicate clearly when the legislation is being developed what that process would look like, so that first nations could have some degree of comfort that the regulations will reflect the needs in their communities.

The Chair: Ms. Kustra.

Ms. Brenda Kustra: If I may, perhaps I'll add a clarification.

In addition to the work we will do with partners up front in actually crafting the regulations, we also need to remember that the regulatory process requires that regulations be published through the *Canada Gazette*. There is a period of consultation associated with regulations that are put up for public review. All of the feedback that comes as a result of that publication period is taken into account. The regulations are then republished before they actually come into force.

So not only is there an opportunity for first nations to participate in the crafting of the initial document that will go up, but there is the regulatory process, which governs the development of all regulations by departments in the Government of Canada. It would kick in, and there would be further public consultation on the draft that had been developed, providing another opportunity for first nations and others who wish to raise concerns and issues to bring them forward.

Thank you.

The Chair: Thank you.

Ms. Crowder.

Ms. Jean Crowder: Thank you, Mr. Chair.

With respect, publishing in the *Canada Gazette* and having an open period for public input does not constitute a consultation process, and there are many tests around the duty to consult. This does not meet those tests.

I agree that the standard process around a period of time to allow for input will be in place, but it does not meet those tests. If the government is operating in good faith, it would outline an adequate process and resources to meet the UN Declaration on the Rights of Indigenous Peoples' duty of seeking free, prior, and informed consent and other tests that have been outlined in a variety of court decisions around “duty to consult”.

The Chair: Ms. Hughes.

Mrs. Carol Hughes (Algoma—Manitoulin—Kapuskasing, NDP): As a follow-up, let me remind you of some of the comments Chief Nepinak made in his recommendations. He went on to say:

> That the AMC recommends the existing Indian Act be amended, minimally and exclusively to deal with the option to extend terms of office and the common election date and that all other provisions be omitted. If the Government of Canada is sincere in its claim that the proposed legislation adds no powers to the Minister [other] than those already possessed, and further asserts that the legislation makes improvements by providing for four year terms of office and optional common election dates; then, the AMC sees no reason why the federal government would object.

As opposed to going through all of this exercise, the chief is basically saying you could have just amended the Indian Act a little bit to allow that.

The Chair: Ms. Hughes, have you any comment specifically related to clause 41?

Mrs. Carol Hughes: Well, it's with respect to the four-year term. This is again a place where you could put it into the existing legislation.

The Chair: Okay. Not seeing any additional speakers to clause 41, I will call the vote on it.

(Clause 41 agreed to)

The Chair: Ms. Crowder, you have an amendment that would follow clause 41.

Ms. Jean Crowder: We are proposing an amendment that would add the following new clause:

> 41.1 (1) Within one year after the coming into force of sections 2 to 5 and 30 to 42, and every two years thereafter, the Minister must prepare a report on the following:
>
> (a) any amendments made to the regulations;
>
> (b) any amendments made to the schedule respecting the additions or removals of, or the changes to, the names of First Nations;
>
> (c) orders of the Minister respecting the coming into force of any community election codes;
>
> (d) names of persons who have been convicted of an offence under this Act and penalized accordingly;
>
> (e) applications submitted to a competent court regarding the contested election of the chief or a councillor of a participating First Nation and any decisions made by the competent court; and
>
> (f) any petitions for the removal from office of the chief or a councillor of a participating First Nation.
>
> (2) The Minister must cause a copy of the report to be tabled in each House of Parliament on any of the first 15 sitting days on which that House is sitting after the Minister prepares it.

Mr. Chair, the reason we are proposing this amendment is to provide some parliamentary oversight with regard to a piece of legislation that could have some significant impacts on communities. I think it is incumbent upon us to determine whether there are any problems, any challenges, or sections of the legislation that require review. It would provide a mechanism by which we could review the legislation and by which the minister could look for any changes that might be necessary.

● (1125)

The Chair: Mr. Strahl.

Mr. Mark Strahl: Thank you very much.

I would argue that parliamentarians already do have an opportunity to review that. Some of us have had the privilege of sitting on the Joint Standing Committee for the Scrutiny of Regulations and have definitely seen these sorts of regs come before that committee. As far as I can tell, paragraphs (a), (b), and (c) as proposed are already required to be reported under the Statutory Instruments Act. It says that those amendments have to be published in the *Gazette*, as was indicated previously.

Certainly anyone who is convicted of an offence, is penalized, or goes to court under this act...those are already publicly reported as well. It seems redundant. It seems to inject the minister unnecessarily into a process when we're trying to remove the minister from the elections process altogether. Put the onus of reporting on first nations leadership to their own electors. This seems to be continuing a paternalistic approach that we're trying to get away from here.

There are two problems that I see with the amendment. One is that it injects the minister unnecessarily, and two, any changes that need to be reported here are already reported publicly through other venues.

The Chair: Ms. Crowder.

Ms. Jean Crowder: I completely disagree with the parliamentary secretary. This is not about a minister interfering with the affairs of a first nation. This is about parliamentary oversight over a piece of legislation. So it's not adding anything additional in terms of ministerial interference with regard to that.

This particular amendment doesn't just deal with the regulations; it deals with other aspects of the legislation. Again, reporting to Parliament is an important function, and if we're talking about accountability and transparency, this will be an important mechanism to ensure accountability and transparency in terms of how this piece of legislation is being unrolled and what some of the implications of it are.

I would urge us to support this particular amendment.

The Chair: Not seeing any additional speakers—Ms. Hughes.

Mrs. Carol Hughes: I just want to remind our colleagues across the way that the witnesses who did appear before us did indicate that the current legislation goes further into a paternalistic approach, contrary to what Mr. Strahl has said. It's his view that he thinks this is going away from the paternalistic approach, but those people who are actually living the current Indian Act and those who are going to be affected the most by this legislation indicate that that's not the case. This is actually going further into the paternalistic approach.

Thank you.

The Chair: Thank you.

Not seeing any additional speakers to amendment NDP 1—this is the amendment that was proposed that would become a new section 41.1.

All those in favour of NDP 1?

(Amendment negatived)

The Chair: We will now consider clauses 42 through 44 inclusively.

Not seeing any speakers to those three clauses, we go to a vote.

(Clauses 42 to 44 inclusive agreed to)

The Chair: Shall the schedule carry?

Some hon. members: Agreed.

The Chair: Shall clause 1 carry, which is the short title?

(Clause 1 agreed to)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

The Chair: Shall we report this bill back to the House?

Some hon. members: Agreed.

The Chair: Colleagues, that is the end of that bill. Thank you.

Colleagues, if there's no further business, we will adjourn. We have a subcommittee meeting following this.

The meeting is adjourned.