Monday, May 13, 2019

The Standing Senate Committee on Aboriginal Peoples has the honour to table its

SEVENTEENTH REPORT

Your committee, which was authorized to examine the subject matter of Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families has, in obedience to the order of reference of Tuesday, March 19, 2019, examined the said subject-matter and now reports as follows:

Your committee held six meetings, heard from more than 30 witnesses and received many detailed briefs on Bill C-92, which seeks to recognize and affirm Indigenous jurisdiction over child and family services. The committee supports this primary objective of the bill. Indigenous groups, communities or people who choose to exercise their jurisdiction will no longer be subject to provincial child welfare laws, which apply as a result of section 88 of the *Indian Act*. After the one-year period for negotiating a coordinating agreement with the federal minister and the province has lapsed, the Indigenous law will prevail over provincial and federal laws where there is a conflict.

We sincerely thank all the witnesses who took the time to share their thoughts with this committee on the bill. The wisdom, knowledge and expertise of witnesses was invaluable for the committee's pre-study.

Indigenous children are vastly overrepresented in the child welfare system, and many have lost all ties to their family, culture and community after having been removed from their homes. The committee heard that while Indigenous children represent 8 % of the population of all children in Canada, 52% of the children in care are Indigenous. Many witnesses told us that, while they strongly support the concept of a bill that recognizes and affirms the inherent rights of Indigenous Peoples and their jurisdiction over child and family services, there are significant gaps in Bill C-92, such as the absence of a reference to the *United Nations Declaration on the Rights of Indigenous Peoples* apart from in the preamble to the bill, the absence of funding principles and other issues which are discussed below. Your committee acknowledges the concerns raised by witnesses. Your committee also acknowledges the testimony of Indigenous organizations and individuals who do not support the bill because they feel that it undermines agreements and processes that were either already in place or were progressing, or because they feel that the bill as drafted imposes limits on their ability to fully exercise their jurisdiction.

The committee acknowledges that mixed reactions to the bill relate in part to relationships Indigenous communities have with the provinces. The committee heard that some First Nations and First Nations organizations have collaborative working relationships with the province in which they are situated, which has led to strong delegation agreements over child and family services. However, other First Nations organizations have problematic relationships with the province, making achieving cooperative agreements difficult or improbable.

When he appeared before your Committee, Minister O'Regan acknowledged that the bill is not perfect, and he welcomed the committee's input to improve the bill. As Mary Ellen Turpel-Lafond, Director of the Residential School History and Dialogue Centre at the University of British Columbia told the committee, "[t]his is a very profound shift that is needed at many levels in Canada. The national

legislation is critically important, as the [Truth and Reconciliation Commission] said, but it requires us to change a number of systems and how they work."

Your committee agrees that if we do not take this important first step, which represents a huge shift in how Indigenous children are considered in child welfare matters, we will be left with the status quo, or worse. Most witnesses agree that the status quo is unsatisfactory.

Bill C-92 has strong potential for being a useful and much-needed tool in the multi-faceted approach that is needed to address the significant overrepresentation of Indigenous children in care. In the spirit of strengthening the bill, your committee raises the following issues that we believe should be addressed as Bill C-92 moves through the parliamentary process.

1. FUNDING

Virtually all witnesses told the committee that a funding commitment needs to be included in the bill, beyond the reference to funding in the preamble and the reference to fiscal arrangements that could form part of a coordination agreement. Some witnesses suggested it be included in the Principles section of the bill, others proposed alternate solutions. We heard that without funding, Indigenous communities will not be able to fully exercise jurisdiction, and that nothing will change for Indigenous children and families. Funding should be long-term, predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality. As Cindy Blackstock, Executive Director of the First Nations Child and Family Caring Society of Canada, shared with the committee in a written submission,

> substantive equality is the achievement of true equality in outcomes through equal access, equal opportunity, accommodation and the provision of services and benefits in a manner and according to standards that meet any unique needs and circumstances, such as cultural, social, economic and historical disadvantage …[and] requires the implementation of measures that consider and are tailored to respond to the unique causes of their historical disadvantage as well as their historical, geographical and cultural needs and circumstances.

She also noted that funding should be adjusted to reflect inflation and population growth.

Linked to funding is Jordan's Principle, which is a child-first principle. Jordan's Principle is intended to ensure that First Nations children receive essential public services and addresses jurisdictional disputes that occur either between a province/territory and the federal government, or between departments in relation to who is responsible for providing a service to a First Nations child. Call to Action 3 of the Truth and Reconciliation Commission of Canada "call[s] upon all levels of government to fully implement Jordan's Principle." The committee heard that there should be an explicit reference to Jordan's Principle in Bill C-92.

Recommendation:

- Add language to the substantive equality principle to ensure that funding for Indigenous Child and Family Services will demonstrate substantive equality, to ensure equal access to services and benefits in a manner and according to standards that meet any unique needs and circumstances, such as cultural, social, economic and historical disadvantage; and

- Include an explicit reference to Jordan's Principle in the preamble of the bill.

2. *United Nations Declaration on the Rights of Indigenous Peoples*

The preamble to Bill C-92 states that "the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples." However, witnesses noted that there is no reference to the United Nations Declaration on the Rights of Indigenous Peoples apart from in the preamble.

Recommendation:

- Bill C-92 should include a reference to the *United Nations Declaration on the Rights of Indigenous Peoples* in the body of the bill, not just in the preamble.

3. "CARE PROVIDER" AND STANDING

Your committee heard that the definition of care provider included in clause 1 would allow non-Indigenous foster parents to have standing in civil proceedings under clause 13, which can contravene the worthy desire to have Indigenous children raised in their families and communities.

Recommendation:

- Bill C-92 should be amended so that only caregivers that have a family, kinship or community relationship with the child can make representations in a civil proceeding.

4. INHERENT RIGHT OF SELF-GOVERNMENT

While the Preamble and clause 18 of the bill refer to the inherent right of self-government, "inherent" is missing from the "purpose" clause in clause 8.

Recommendation:

- Add "inherent" to clause 8(a)

5. PRINCIPLES AND BEST INTERESTS OF AN INDIGENOUS CHILD

The committee heard that requiring that primary consideration be given to the child's physical, emotional and psychological safety, security and well-being (clause 10(2)) may be interpreted by courts in a manner that maintains the status quo with a focus on protection instead of prevention. In addition, a report by the Yellowhead Institute that was distributed to the committee referred to judicial bias in interpreting the best interests of the child. The committee notes that addressing judicial bias through training for judges will be essential to support the application and interpretation of the bill.

Also, the committee heard that the bill could be strengthened by:

- adding an "impermissible reasoning" clause (which would restrict the way in which certain evidence could be relied upon and interpreted in matters before the court, for example the length of time that a child is not in the care of their parents is not in itself reason to terminate the parental relationship on a permanent basis);
- adding an "active efforts" principle, which requires demonstrating that active efforts have been made to keep an Indigenous family together before removing a child;
- ensuring that cultural continuity reflects Indigenous cultures; and
- considering the needs of children in care for support by Indigenous communities or provinces and territories beyond what is considered by most provinces as the age of majority.

On this last point, the committee heard poignant testimony from Cheyenne Andy and Ashley Bach, two strong, brave Indigenous young women with lived experience in foster care who shared their experiences in foster care and the challenges and lack of support they faced once they reached the age of majority in their home province.

Recommendations:

- revise the bill to ensure that considerations relating to an Indigenous child's connection to family, culture and community and the child's physical, emotional and psychological safety, security and well-being are given equal weight;
- add an "impermissible reasoning" clause;
- add an "active efforts" principle;
- take steps to ensure that cultural continuity reflects Indigenous cultures; and
- add provisions that reflect the need for children in care to be supported beyond the age of majority as appropriate, and as determined by the Indigenous group or community.

6. DISPUTE RESOLUTION

Witnesses noted that the shift envisioned by Bill C-92 will inevitably lead to disputes, particularly in relation to funding for Indigenous groups, communities or people who choose to exercise their legislative authority over child and family services. While there are references to dispute resolution mechanisms in the bill, including that a dispute resolution mechanism could be developed through regulations to promote entering into a coordination agreement, the committee heard that an effective, independent body should be established to address disputes between Indigenous communities, the federal government and provinces or territories. An independent body is needed to address the power imbalance between Indigenous communities, the federal government, and provincial/territorial governments.

Recommendation:

- the Government of Canada, in collaboration with First Nations, Inuit and Métis, and provinces and territories, must explore ways to facilitate effective dispute resolution, including the possibility of establishing an independent alternative dispute resolution body.

7. RECOGNIZING EXISTING INITIATIVES/AGREEMENTS

The committee acknowledges that some Indigenous groups have already made significant strides in addressing child and family services needs in their communities. In particular, the committee notes the work done by the Assembly of Manitoba Chiefs (AMC). In December 2017, AMC signed a Memorandum of Understanding with the federal government relating to child and family well-being, and the organization has developed their own legislation known as the Bringing our Children Home Act. These efforts, and those of other Indigenous organizations and communities, should be recognized in the bill. Existing agreements, or agreements that are in the process of being developed should be honoured and respected so that they are not contravened.

Recommendation:

- add after clause 5 of the bill a provision that clarifies that nothing in the bill contravenes existing agreements such as the MOU between the Assembly of Manitoba Chiefs and the federal government;

- Include shorter timeframes for coordinating agreements for Indigenous groups that already have initiatives underway in relation to child and family services.

8. DATA COLLECTION

The committee notes that clause 28 of the bill provides for agreements with provincial governments and Indigenous governing bodies relating to data collection. The committee heard that data is critical to keep the federal government accountable. Also, it is important to have

disaggregated data, while at the same time ensuring that the privacy of Indigenous children, particularly in smaller communities, is protected.

Recommendations:

- the Government of Canada should review the provisions in Bill C-92 to ensure they can facilitate disaggregating data and that they protect the privacy of Indigenous children;
- the Government of Canada should support the work of Indigenous organizations that collect data; and
- the Government of Canada, in collaboration with Indigenous Peoples, should establish the position of First Nations, Inuit and Métis Chief Statistician.

9. REVIEW

The committee heard that in addition to the five-year review which is included in clause 31(1) of the bill, having the bill initially reviewed after three years may be preferable, in addition to annual reports on the bill's implementation. The first report could be on methodology/indicators.

Recommendation:

- Include a provision that would provide for an initial review of the bill after three years, as well as annual reports on the bill's implementation.

10. OTHER ISSUES

The committee wishes to highlight challenges that undoubtedly lie ahead for Indigenous communities as they transition to exercising jurisdiction over child and family services. We urge the government to provide necessary support to all communities who wish to exercise jurisdiction, including communities who may lack capacity to do so at this time.

Finally, we recognize that while there were a variety of opinions expressed with respect to what has been described by the federal government as a "co-development" process, many witnesses who came before us challenged the idea that Bill C-92 was co-developed. Some witnesses felt that while they may have been engaged by Indigenous Services Canada and participated in information sessions in relation to the development of Bill C-92, this effort was inadequate, and could not be considered true consultation. The lack of meaningful consultation is a message heard by your committee time and time again, and we urge the federal government to review its policies and practices relating to policy development and development of legislation that affects Indigenous Peoples in Canada to ensure that this repeated concern is addressed.

Respectfully submitted,

Senator Lillian Eva Dyck

Chair