June 21, 2012

Via email: minister@aadnc-aandc.gc.ca.

The Honourable John Duncan
Minister of Aboriginal Affairs and Northern Development
Les Terrasses de la Chaudière
North Tower
10 Wellington Street, Room 2100
Gatineau, QC K1A 0H4

Dear Minister Duncan:

Re: Bill C-27: First Nations Financial Transparency Act

I am writing on behalf of the National Aboriginal Law Section of the Canadian Bar Association (CBA Section) to voice some concerns about Bill C-27, the First Nations Financial Transparency Act. We hope that you will consider these concerns in your deliberations on the Bill.

The CBA is a national association of over 37,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of lawyers specializing in Aboriginal law and related issues from across Canada.

The CBA Section is not in favour of Bill C-27. It is intended to enhance the financial accountability and transparency of First Nations' governments by requiring them to prepare and disclose audited consolidated financial statements and schedules of remuneration.[1] If passed, Bands would be required to publicize financial information on the Internet and on the website of Aboriginal Affairs and Northern Development Canada, and provide copies to band members upon request. This information would then remain publicly available for at least 10 years. If a First Nation fails to comply, the Minister is empowered to withhold funding until it does.

The CBA Section believes the proposed Bill would not improve the capacity of First Nations to assume control over their own affairs. By focusing only on the expenditures of First Nations, the proposed legislation fails to address larger systemic issues of funding and responsibility for those issues.

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[1] This does not include bands who have signed a comprehensive self-government agreement.

Bill C-27 follows similar legislation proposed last year,[2] coinciding with a report published by the Canadian Taxpayers' Federation (CTF) detailing salary figures of First Nations' chiefs and councillors across Canada. CTF claimed that 160 First Nations' leaders earn more than their respective provincial premiers, and 50 were paid more than the Prime Minister.[3] CTF also alleged that over 600 First Nations' officials received an income equivalent to $100,000 off reserve.[4] The Assembly of First Nations (AFN) expressed concern with CTF's methodology, noting that its calculations included travel expenses and per diems. Based on AFN's recalculations, First Nations' officials were paid an average of $36,845 per year.[5] AFN found that only 3% of chiefs and councillors earned over $100,000, less than 1% more than their provincial premiers, and none more than the Prime Minister.[6] AFN also said that CTF's use of "taxable equivalents" inflated salaries and suggested exorbitant income. AFN noted that the use of the term "taxable equivalent" overlooks the fact that not all band council members are status Indians and therefore do not benefit from tax exemptions for income earned on reserve. Further, it does not acknowledge the historical and constitutional basis for such arrangements.

Discussion

We are concerned that debates which focus on such matter make an informed discussion about the realities of First Nations' governments difficult. In principle, all parties agree that accountability and transparency of First Nations' elected officials is a top priority. Indeed, some First Nations have had financial regulations and budgetary laws for decades, adopted under their own constitutions or customary laws.

Whether this proposed legislation would achieve the goal of accountability and transparency in an appropriate manner is a different question. Given First Nations' inherent right to self-governance, dictating reporting requirements without sufficient consultation with First Nations is problematic. It fails to recognize the unique constitutional arrangements between First Nations and the federal government, and does little to move away from the paternalism which has historically defined this relationship.

The level of public disclosure required of other governments in Canada differs widely. In Quebec, public sector salaries are considered personal information, making their disclosure illegal.[7] In Ontario, the government posts the names of all public sector employees who earn over $100,000 a year on a dedicated website. This includes the salaries of employees from municipalities, hospitals, universities, school boards and public sector ventures. In British Columbia, the Financial Information Act requires provincial and municipal government agencies to disclose the total remuneration of anyone earning more than $75,000 a year. Similarly, the Public Sector Employers Act mandates disclosure of all compensation provided to Chief Executive Officers and the next four highest ranking executives in public sector organizations. However, in the absence of a comprehensive database, the Vancouver Sun has taken on the task of centralizing publication. While most provinces have instituted public sector salary disclosure to varying degrees, the information is generally limited to total salaries, bonuses, and benefits packages.

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[2] Private Member Bill C-575, introduced by MP Kelly Block.

[3] Canadian Taxpayers Federation, "New Jaw-Dropping Reserve Pay Numbers" (November 21, 2010) accessed online at: http://taxpayer.com/federal/new-jaw-dropping-reserve-pay-numbers on November 29, 2011.

[4] Ibid.

[5] Assembly of First Nations, "The Straight Goods on First Nations Salaries" (November 2010) accessed online at: http://www.afn.ca/uploads/files/accountability/5_-the_straight_goods_on_first_nation_salaries.pdf, on November 28th, 2011 at p. 3 (AFN). Note that calculations were based on salary and honourariums.

[6] Ibid. at 4.

[7] Kevin Dougherty, "Public Salaries not so Public" (Montreal Gazette: February 7, 2011) accessed online at http://www.montrealgazette.com/life/Public+salaries+public/4233811/story.html on November 29, 2011.

As part of ongoing reconciliation efforts, many First Nations are engaged in activities like treaty making and the settlement of claims based on their Treaty and Aboriginal rights. They also negotiate and consult with industry over development in their territories. These activities necessitate travel and associated expenditures, particularly costly for remote communities. However, meaningful engagement of First Nations provides important social and economic benefits directly to First Nations' communities, as well as to all Canadians. It is unfair to characterize the expenses involved as frivolous or for the personal benefit of band council members, given this context.
Ultimately, the Chief and Council should be accountable to the members of the First Nation, as those members are best positioned to say whether the salaries of Chief and Council are "reasonable" given the work they do in the particular context. Remuneration should be disclosed annually to the members of the First Nation.

There have been instances of poorly run First Nations and corrupted administrations. However, those problems also occur in non-Aboriginal communities, municipal, provincial and federal. Further, funding agreements between First Nations and the federal government for programs and services provide mechanisms to redress irregularities that might occur in spending funds, including clawing back funds that the federal government perceives to have been spent inappropriately. The federal government can use those mechanisms when action is required. It is unclear what the proposed bill would achieve in addition to remedial powers in these agreements.

Under Bill C-27, First Nations' officials would have to disclose more information, including travel and incidental expenses associated with the performance of job-related duties. Further, the consolidated financial statements and schedules of remuneration allow a far more detailed inspection of expenses than those released by provincial or territorial governments.

The practical requirements of the legislation have the potential to be unduly burdensome to First Nations. Most First Nations' communities consist of fewer than 500 residents, many in remote areas, which impacts both service delivery and operating expenses.[8] Most communities do not have funding to build the infrastructure necessary for Internet access, or the resources to create and maintain their own websites. Further, First Nations are already under a tremendous reporting burden. In 2002, the Auditor General of Canada estimated that each First Nation was already required to submit at least 168 reports on federal government programs annually.[9] She called for this number to be reduced, stating that "[r]esources used to meet these reporting requirements could be better used to provide direct support to the community."[10] These observations were reiterated in the Auditor General's subsequent 2006 report, and ongoing concerns were expressed in the most recent 2011 report, which said that "we remain concerned about the burden associated with the federal reporting requirements, particularly related to INAC's contribution agreements with First Nations. Many initiatives with the potential to streamline reporting have been started but have not resulted in meaningful improvement."[11] These realities also suggest that further consideration should be given to the need for the proposed legislation.

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8 Report of the Auditor General of Canada to the House of Commons, "Chapter 1: Streamlining First Nations Reporting to Federal Organizations" (December 2002) accessed online at: http://www.oag-bvg.gc.ca/Internet/English/parl_oag_200212_01_e_12395.html at para 1.11.

9 Ibid.

10 Ibid., at para. 1.3.

11 See, Reports of the Auditor General of Canada to the House of Commons, (2006) Chapter 5, Management of Programs for First Nations, and (2011) Chapter 4, Programs for First Nations on Reserve, accessed online at http://www.oagbvg.gc.ca/internet/English/parl_oag_200605_05_e_14962.html at 4.85.

A troubling potential outcome of the proposed legislation could be misplaced confidence that the problems are solved by excessive reporting requirements imposed on First Nations' governments. Mandatory disclosure of consolidated figures to the federal government, including information on non-government funds (sometimes referred to as "own source" revenues), is troubling, especially where litigation and negotiations involving the federal government are ongoing. The legislation will not increase the capacity required to facilitate best practices of First Nations' governments. Financial statements alone do not provide a meaningful measure of performance, nor are they a fair reflection of community priorities. In addition, non-compliance with onerous reporting burdens can lead to disastrous consequences, such as those flowing from the recent housing crisis at Attawapiskat First Nation.[12] Withholding funds for non-compliance might result in the federal government failing to meet its constitutional obligation to provide essential services to all Canadians.

We believe that Bill C-27 should not be passed. Rather than focusing on legislation that diverts attention from more pressing challenges facing First Nations' governments, we encourage a nation to nation dialogue held in the light of constitutional principles.

Thank you for considering the views of the CBA Section.

Yours truly,

(original signed by Marilou Revee for Aimée E. Craft)

Aimée E. Craft
Chair, National Aboriginal Law Section

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12 See http://fullcomment.nationalpost.com/2011/12/04/brett-hodnett-the-real-math-behind-attawapiskats-90-million/ accessed online on December 8, 2011.