HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

# Standing Committee on Indigenous and Northern Affairs

INAN • NUMBER 147 • 1st SESSION • 42nd PARLIAMENT

**EVIDENCE**

## Thursday, May 2, 2019

## Chair

**The Honourable MaryAnn Mihychuk**

# Standing Committee on Indigenous and Northern Affairs

**Thursday, May 2, 2019**

● (0830)

[*English*]

**The Chair (Hon. MaryAnn Mihychuk (Kildonan—St. Paul, Lib.)):** Good morning, everyone. We are at the Standing Committee on Indigenous and Northern Affairs of Canada, and we are studying Bill C-92. We have the privilege of having video conference participation as well as in-house representatives of various groups and individuals.

Before we start, we always recognize that we are on the unceded territory of the Algonquin people here, in a hope that all Canadians will start to consider where they're from, what the history of the region is and to participate actively in reconciliation.

Let's get started. The way the process works is that every presenter —and sometimes you split your time—will get up to 10 minutes. I'll give you signals as you get close to that, and after all presentations are done, which will be in 30 minutes, we go through questions from members of the committee.

All right, not to take any time away from you, we will begin with the Women of the Métis Nation, Melanie Omeniho.

Melanie, it's your turn to start.

**Ms. Melanie Omeniho (President, Women of the Métis Nation / Les Femmes Michif Otipemisiwak):** Thank you.

Good morning, everybody.

My name is Melanie Omeniho and I am the President of Les Femmes Michif Otipemisiwak, Women of the Métis Nation.

I want to identify, before we get going, that Les Femmes Michif Otipemisiwak is not the French version of Women of the Métis Nation. It actually is a Michif name that was given to us by our elders, and it means “the Métis women who own themselves”.

LFMO is the recognized voice of the Métis women across the Métis homeland. We operate in a democratic, transparent and fiscally accountable manner. We work to try to influence public policy and decision-making related to concerns and aspirations of Métis women at all levels of indigenous and Canadian government.

In terms of LFMO's views on Bill C-92, we are looking at it as a step-forward draft at best. It falls short of accomplishing its goals to shift child and family services from a system of apprehension to a system built around preventative and family-supportive care. This is another example of a pan-indigenous approach to system change that does not acknowledge the distinctions among first nations, Métis and Inuit people. It does not acknowledge the unique distinctions of each of the indigenous peoples of Canada, and that a one-size-fits-all approach has been a failure in the past. It is important to acknowledge the impacts that colonization has had from a distinct perspective. This bill also misses the mark in transferring full and complete jurisdiction of child and family services.

Although highlighted in the principle of “substantive equality”, paragraph 9(3)(b) reads:

> (b) a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

We find this paragraph is contradictory from a gendered lens, as the entire document incorporates a very gendered use of the terms “he” and “she” or “him” and “her”, instead of “they” and “them”. LFMO recommends that the language be amended to reflect the principles of these issues, so that it is a gender-friendly document.

LFMO believes that the principle of the “best interests of the child”, must be defined. It is not specific enough to counteract the impact of the dominant culture on indigenous children and families. Subclause 9(1) is set out and prioritizes the “best interests of the child”. This principle, as defined, could lead to further marginalization and does not protect children and families who are in poorer socio-economic situations.

It is known that the poverty experienced is a result of colonization. We have seen that using western concepts of well-being when considering indigenous children causes increased involvement with child and family services and leads to apprehension of indigenous children.

LFMO recommends that the principle be clearly defined as to what “best interests” mean, and that the three principles defined are given equal weighting.

It's been for far too long that fostering a child has not been motivated by altruistic goals. To some, this is a paycheque. Our children are not an object of commerce in the child and family services economy, and every effort should be exhausted to ensure that care providers are assessed to ensure that this is not the primary motivation.

Where this is of specific note is in clause 13, where representations and party status are granted to care providers. As care providers are paid for their work with the child, it is counterproductive and harmful to the child that these entities are given standing in consideration of the well-being of the child. LFMO recommends that care providers are excluded from representations and standing to ensure that the child's interests are primary and not the socio-economic gain of a care provider.

● (0835)

LFMO recommends that the dispute resolution mechanism be defined in the event that provinces and an indigenous governing body cannot enter into coordination agreements. Without further definition, the dispute resolution process will most likely align with the federal or provincial government approaches rather than an indigenous model of dispute resolution. Mechanisms must be in place to provide for binding decisions.

The main concern of Bill C-92, from Métis women's perspective, is that it is presented without a definition of funding pathways to ensure full participation by indigenous nations. With no predictable funding, the principle of “substantive equality”, as defined in the act, is a moot point. We cannot fully participate unless we are fully resourced to do so. This will impede our involvement with indigenous children and youth from when they enter to when they exit the child welfare system.

Les Femmes Michif Otipemisiwak offers the following recommendations to be included in Bill C-92: that a distinctions-based approach be applied to the act; that prevention and early intervention be the model of care, rather than apprehension; that the Métis Nation and Les Femmes Michif Otipemisiwak be provided with predictable funding to ensure that adequate infrastructure is in place to respond to the needs of our Métis children; that Métis children in care are identified as Métis, not as “other Indigenous”; that resources be allotted to ensure full wraparound services for Métis children; that the age of youth in care be extended to 21 years old, so that our children do not fall into other systems, such as the justice system; and that Métis data collection and research models be resourced to ensure that funding reflects the magnitude of the number of children in care.

Thank you.

● (0840)

**The Chair:** Thank you very much. That was very insightful.

We're looking forward to hearing from Naiomi Metallic and Hadley Friedland, who are sharing time. However you want to do that, please go ahead.

**Professor Naiomi Metallic (Chancellor's Chair in Aboriginal Law and Policy and Assistant Professor, Schulich School of Law, Dalhousie University, As an Individual):** Good morning.

You know that we are two of the authors of the Yellowhead report card on Bill C-92. I believe you've been provided with that report, and you know that in our report we found significant problems. That said, we do believe that the legislation has good spirit and intent behind it, but there are some key improvements that we believe must be made in order for it to be effective.

We're going to split our time. What I'm going to focus on is why we believe it is so important for the bill to address funding and accountability. This is intertwined with jurisdiction because, really, if there is no funding and accountability built into this act, what this bill will do is merely provide indigenous people with the jurisdiction to legislate over their own poverty.

I've seen the blackline version that Cindy Blackstock has been circulating, and I believe members of this committee have a copy of that. I do believe that what is proposed in the suggested amendments on funding and accountability are workable solutions.

We really believe that this bill is an opportunity to make a difference in such an important area. It has been said by many, including the TRC and the Canadian Human Rights Tribunal, that the child welfare system is today's modern incarnation of the residential school system. You as lawmakers have a really historic opportunity before you to do something, perhaps, that previous parliamentarians didn't do or couldn't do. I urge you to do this right, because if you don't and you produce something that is just a hollow gesture, then that's not sufficient for indigenous children.

A lot of my writing as an academic has been on how child welfare is a very problematic area in terms of how it is structured with respect to first nations issues. It suffers from major systemic problems and structural design problems. I have a very long paper on it if you want to read it, but just to give you the high points of it, it's a system that has been in place for almost 70 years. A key feature of it is jurisdictional neglect, meaning that neither the federal government nor the provincial governments have ever really wanted primary jurisdiction in this area. Both argue that the other is accountable to provide services in this area, and indigenous issues and first nations issues become a jurisdictional hot potato. This leaves indigenous kids in a vacuum and creates risks and uncertainty, and that's in nobody's interest.

The system has also allowed underfunding to continue knowingly for over a decade by Department of Indigenous Affairs officials, while at the same time going unnoticed by parliamentarians and Canadian society more broadly. The system as it's currently structured really doesn't provide oversight and accountability, and we desperately need it. The way the system has been structured also creates a terrible power imbalance, where first nations have really very little means to challenge the system and to hold officials accountable.

But for Cindy Blackstock and the AFN bringing their case forward, we wouldn't be here. It's so important to remember that case. The case is a real watershed for a couple of major reasons. First, it not only found that indigenous services are underfunded but also that indigenous people are entitled to funding and services that meet their needs and circumstances, just like all other Canadians. The decision is also very clear that it is the responsibility of the federal government under 91(24) to provide these services and funding.

With that said, I am a proponent of the federal government legislating in this area, but it cannot just be about recognizing jurisdiction alone. That is a necessary part, but it is not sufficient on its own. The law also needs to put in funding mechanisms and accountability measures. Funding should not be made contingent upon first nations and other indigenous groups reaching an agreement with provincial governments. Really, the buck should stop with the federal government. If the federal government feels that the provinces should be kicking in some money as well on this, then leave that to the feds and the provinces to negotiate.

● (0845)

Do not put it on the backs of indigenous people, who have historically faced some massive power imbalances, to have to try to negotiate it themselves. It's not going to work and we're just going to be left legislating our own poverty. That sort of approach, leaving it to the feds and provinces to work out if they want to share money, is consistent with Jordan's principle.

I'm running short on time. I echo the sentiment that there needs to be an independent decision-making body with the ability to make binding decisions on accountability. The proposal I've seen is to allow the Canadian Human Rights Commission to be the body to do that as a last resort. I believe that makes a lot of sense, although I encourage dispute resolution mechanisms built within the system.

Finally, I believe that consistent with call to action 2, there needs to be mandatory data collection as part of the accountability measures built into this bill.

Thank you.

**Professor Hadley Friedland (Assistant Professor, Faculty of Law, University of Alberta, As an Individual):** I'll pick up on talking about the issue of best interests of the child in the national standards, and I'll also talk about jurisdiction and some suggestions for strengthening this bill so its intent is met.

Best interests of the child, we firmly believe that without some strong mandatory language to address bias and to clearly overtake binding precedent, this bill could easily maintain the status quo. Nobody is saying there's anything wrong with “best interests of the child”, the idea that the child should be at the centre and the child's needs are the most important. I think everybody's in agreement with that. It's how it's been interpreted and how it's been applied by the courts that has been detrimental to indigenous children.

There are two legal issues. The first legal issue for “best interests of the child” leading to overrepresentation is that almost all provincial statutes have mandatory timelines, whereby after a certain amount of time in care, all of a child's legal relationships with their family and extended family will be severed permanently, based on time, regardless of what's in their best interests.

The second is a 1983 Supreme Court case called Racine v. Woods that is still good law. It's still binding precedent, as in, lower courts must apply it to a case before them. This links a concept of best interests of the child to a troublesome notion that the importance of inherited cultural background fades with time, while the importance of bonding increases.

This was from 36 years ago. Attachment theory has vastly improved since experts weighed in. We have the case of Brown in Canada, the sixties scoop, which points out with experts across the country that the absence of being connected to that cultural heritage caused great harm. We also have a very different landscape in family law. We have children living in joint custody situations, we have contact orders, we have a lot more tools and we know that children grow up in a variety of family structures and do very well as adults. We've moved past this but the law with Racine v. Woods has not.

I have some suggestions for adding or amending to address this issue.

Consider an impermissible reasoning clause. When determining the best interests of the child, it would be impermissible to say the length of an indigenous child's time out of parental care or in the care of a specific caregiver is sufficient reason in itself to say it's in the best interests of the child to sever relationships or grant permanency.

Consider an active efforts principle, as in the American act that deals with indigenous child welfare, which encourages preventative care and requires decision-makers to say what steps have been taken in the best interests of the child before removal.

Consider removing “best interests of the child” where it is unnecessary. In section 23, subjecting indigenous laws to the best interests of the child, be very specific. If that's about immediate physical safety, say immediate physical safety as opposed to best interests. Keep in mind that the courts will retain their parens patriae jurisdiction. Courts can always weigh in on laws that they think are not in the best interests of the child.

Turning quickly to jurisdiction, it is a huge positive step forward to acknowledge the inherent jurisdiction in this area. We are recommending certainty and clarity: clarity in defining federal and provincial jurisdiction, as my colleague said, and clarity in conflicts. Paramountcy rules need to be clear enough that a front-line social worker dealing with a crisis understands what the law requires of them. There also needs to be certainty of access to indigenous laws, addressing whether this jurisdiction is reserved to geographical areas like on reserve or if it follows indigenous citizens where they go, where indigenous children go, including off-reserve first nations children, Métis children, Inuit children, non-status children, making sure they also have access to indigenous laws.

● (0850)

Finally, it comes back to my colleague's point, certainty of funding, ensuring that this is not a hollow promise, because without the resources to develop, implement and deliver on indigenous laws, the jurisdiction is going to remain hollow.

**The Chair:** Thank you very much.

Next we have Dwight Newman, Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law.

Dwight, you have been very patient. Thank you for that.

Welcome to our committee. We look forward to your comments. You may start whenever you're ready. You have 10 minutes.

**Professor Dwight Newman (Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law, University of Saskatchewan, As an Individual):** Good morning.

As mentioned, my name is Dwight Newman. I'm a Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan. I have done writing on various topics in indigenous rights law. I also write on general constitutional law topics. With regard to the latter writing, I'm an author of the *Halsbury's Laws of Canada* volume on the Charter of Rights, and along with Ottawa practitioner Guy Régimbald, a co-author of a thousand-page constitutional treatise, *The Law of the Canadian Constitution*, published by LexisNexis and now in its second edition.

Although we're discussing a bill profoundly important to addressing ongoing harms against indigenous children and indigenous communities, my comments today will be on more general constitutional considerations related to the bill. In short, I think that there are some issues with the constitutionality of significant parts of the bill and that the committee should be adducing further evidence on these matters and quite possibly amending parts of the bill.

While the minister tabled the now standard charter statement on the bill in the House of Commons on April 29, there are constitutional considerations going beyond the charter that deserve further attention here, obviously in addition to the section 35 issues. In particular, the bill involves an extremely muscular assertion of federal jurisdiction in areas that have traditionally been under provincial jurisdiction. In my view, it appears to do so in ways that go beyond the scope of federal jurisdiction, at least in parts of the bill.

Let me be clear from the outset. Everyone knows that jurisdictional quagmires have been problematic in getting to good ways forward in this area, and we need to find ways past those. The references by earlier witnesses to the jurisdictional hot potatoes are a horrible Canadian legacy. We could talk about the horrible funding disputes that gave rise to the need for Jordan's principle and that give rise to ongoing problems. There's every reason why the division of powers between the federal and provincial governments isn't necessarily what people want to think about when trying to come up with solutions, other than to find ways past that.

At the same time, federal legislation still can't unilaterally operate in ways that set out to legislate in areas of provincial jurisdiction. The Supreme Court of Canada has identified federalism as one of the four key constitutional principles defining the structure of the Canadian constitution. Canada is a federation, not a unitary state, and it's vital to maintain respect for federalism pursuant to the established powers in the constitution.

Clause 7 of the bill sets matters off on a problematic track, stating:

> 7 This Act is binding on Her Majesty in right of Canada or of a province.

From the outset, we see a claim to legislate concerning the activities of the executive arms of the provincial governments that's inconsistent with the principles of federalism.

I feel like I'm offering an 8:30 a.m. division of powers seminar there and a 6:30 a.m. division of powers seminar here via video, which is not a popular option with students or with anyone else, but I want to quickly set out the pertinent claims to jurisdiction as they apply to the rest of the bill. Under the section 92 powers in the Constitution Act, 1867, the provinces, in 92(13) and 92(16), have wide powers over matters of private law and matters of local concern that have always grounded, in general, a provincial jurisdiction to deal with child welfare matters.

That was extended to on-reserve jurisdiction, the application of provincial jurisdiction on reserve, by section 88 of the federal government's Indian Act, which gives power for provincial legislative provisions to apply even on reserve.

The federal government has in 91(24) of the Constitution Act, 1867 a power—which I emphasize is in the language of 1867 and which I always put it in quotes—over “Indians, and Lands reserved for the Indians”. Subsequent case law has made clear that this power extends in relation to fundamental governmental relationships with all aboriginal peoples of Canada—first nations, Métis and Inuit—as in section 35 of the Constitution Act, 1982.

● (0855)

One challenging dimension is that 91(24) and the scope of federal power haven't been well defined in case law in general, leave aside the child welfare context. The case law has seen 91(24) invoked more to say what provinces can't do than what the federal government can.

There are real questions on how far 91(24) extends, but it has to be understood in the context of the rest of the powers in sections 91 and 92. The scope of the federal 91(24) power would, in my view, certainly extend to matters of governmental relations with indigenous governing authorities. I would see it as having lots of potential to support provisions in the bill, like clauses 20 through 24, that essentially recognize the legal power of indigenous groups, communities, governments and governing authorities.

Even there, though, I might flag subclause 22(3) as warranting some discussion on whether the federal government can cause every law of an indigenous group to prevail over provincial law in every instance. It's one of these paramountcy or conflict clauses, and I agree entirely with the point made earlier that there needs to be certainty in the law. The context is the front-line social worker, who needs to know what the law is, obviously. There needs to be a law that fits with the division of powers, and I think there may be some issues with subclause 22(3).

Even more significantly, clauses 10 through 17 give rise to some significant questions on divisions of power. As set out in the bill in its present form, they would seem to be framed in a way that applies to even provincial child welfare decisions off reserve and outside of the scope of any indigenous governing authority, as soon as an indigenous child is involved. They simply regulate concerning every indigenous child in more far-reaching ways.

They contain many good principles. The spirit and aims of the bill are all very important, but there are serious questions on whether the federal government has the constitutional authority to unilaterally enact some of these parts of the bill.

If the bill continues in something like its present form, I would recommend amending clause 7 to make it binding on only the federal Crown, and I would recommend further review of questions on divisions of powers with regard to clauses 10 through 17, as well as subclause 22(3). There may be others, but those are some that I would highlight.

I would suggest seeking further advice from Justice Canada on these matters while subjecting their views to critical scrutiny to see if there's a solid 91(24) basis for these provisions.

I would, quite possibly, recommend amending the application of clauses 10 through 17 to be triggered by agreement with each province. I would hope there would be goodwill with the provinces to develop good implementation here. If there is a division of powers issue there, the unilateral assertion of federal jurisdiction isn't going to further co-operation with the provinces, and it may subject the bill to ongoing constitutional challenges that could mire the bill rather than moving it forward in supporting the futures of indigenous children and in supporting reconciliation.

There are tough matters here. Unfortunately, there aren't easy answers and there aren't easy ways forward, but those would be a few reflections on some things to think about further in the bill, along with the excellent comments that we heard from other witnesses this morning.

● (0900)

**The Chair:** Thank you very much.

Our questioning period begins with MP Yves Robillard.

Please go ahead.

[*Translation*]

**Mr. Yves Robillard (Marc-Aurèle-Fortin, Lib.):** Thank you all for your presentations.

My first questions are for Ms. Metallic.

On Tuesday, when the committee last met, Laurie Sargent, from the Department of Justice, explained that this was a novel piece of legislation. It's one of the first to recognize the rights of indigenous peoples pursuant to section 35 of the Constitution. She said there was little in the way of relevant case law.

Could you give us a bit more detail on the constitutional legality of delegating jurisdiction over child welfare to indigenous communities themselves?

**Prof. Naiomi Metallic:** Yes, of course.

If I'm not mistaken, you'd like me to talk about the case law demonstrating that it's constitutional to recognize the authority of indigenous peoples.

The 1996 report of the Royal Commission on Aboriginal Peoples recognizes the right to self-government pursuant to section 35. The United Nations Declaration on the Rights of Indigenous Peoples also recognizes that right. The current government is going to pass legislation recognizing their right to self-determination and self-government.

Agreements on indigenous self-government have existed since 1996. Many such agreements exist in Canada, but the matter has not made its way to the Supreme Court of Canada.

A number of British Columbia court decisions recognize the constitutional validity of the agreements, including Campbell v. British Columbia and Sga'nisim Sim'augit (Chief Mountain) v. Attorney General of Canada. I would be happy to forward the information to your staff. These two decisions recognize that self-government agreements are constitutional.

**Mr. Yves Robillard:** Thank you.

Many parallels can be drawn between Bill C-92 and the Indian Child Welfare Act passed in the U.S. in 1978. According to Terri Libesman, the author of *Decolinising Indigenous Child Welfare: Comparative Perspectives*, the American law has made great strides by including indigenous peoples in child welfare decision-making and has served as a model for representatives of indigenous children's groups around the world.

Could you talk about the similarities between Bill C-92 and the U. S. approach?

● (0905)

**Prof. Naiomi Metallic:** Would you mind if I asked my colleague to answer that?

**Mr. Yves Robillard:** No, not at all.

[*English*]

**Prof. Hadley Friedland:** There are similarities.

A few of the things that have been brought here recognizing that inherent jurisdiction are similar to the Indian Child Welfare Act. The placement priority in this act is similar to the Indian Child Welfare Act. They also have a placement priority. I do think there is stronger language in the Indian Child Welfare Act in the U.S. that is missing in Bill C-92. For example, they have a reasonable and active effort section saying that active efforts need to be taken before removing a child or not placing with family. That's an example where Bill C-92 isn't as strong.

[*Translation*]

**Mr. Yves Robillard:** My next question is for Ms. Omeniho.

Minister O'Regan told the committee about the co-development process behind the bill, saying he held 65 meetings all over the country. He also talked about the fact that there were mixed feelings about the bill and even skepticism that it would come to fruition.

Could you talk to us about what Métis communities expect from the bill? Do you think the consultation process tied to the bill is a step in the right direction?

[*English*]

**Ms. Melanie Omeniho:** First off, there was a considerable amount of consultation that was done in relationship to the building of this law. I want to tell you that I don't know that I would have defined it as co-developed. I'm going to be sincere about that. We didn't even see the bill that was being brought forward, the final draft of the bill. We weren't allowed to see that. We last reviewed a previous draft. Co-development to me would be that we were actually working to develop it together, but really we were responding to what the justice department put forward in the bill. It wasn't us coming up with the pieces of the bill.

We did our best to have as much influence and engagement on those pieces as we could. We are hopeful that this is at least looking at and putting a light on an issue that has been a long-term problem for Métis children and Métis families. We are hopeful that with the work your committee and others are doing on this legislation we will have a piece of legislation that will assist us in ensuring that we change the road on where Métis children and Métis families have been so negatively impacted and affected.

Just to even put it this way, we've had many children die in care. Many of our children, especially among the Métis, because of the issue around whose jurisdiction we fall under has only recently been coming to the forefront.... We've had children identified as unknown aboriginal, so that they've fallen within the cracks of these systems. They haven't been addressed. In some instances—I'm going to tell you that we know this—I've worked with families whose children have died in care and they haven't even been told until months later. They're never told why those children died.

This legislation is going to help us change some of that. It's going to help make accountability come into play, especially if we address some of the issues of who is going to financially resource some of this stuff.

Thank you.

[*Translation*]

**Mr. Yves Robillard:** Thank you very much.

[*English*]

**The Chair:** Thank you.

Questioning now moves to MP Cathy McLeod.

**Mrs. Cathy McLeod (Kamloops—Thompson—Cariboo, CPC):** Thank you to all the witnesses for very compelling testimony.

You will see from all parliamentarians that we understand there's a very tragic situation that has gone on for far too long and that we need to find ways to address it. As we look at this bill what we really are trying to do is to make it right. I think we're all coming from a good place. The question is just where this bill is going to end up because it's very complex and complicated. To be quite frank, I think it's going to be rushed in many ways.

I take note of Mr. Newman's comments. We did have the Department of Justice here, but I think there was a grand total of five minutes to question the official. I want to take a quote from her. She said that “this legislation certainly recognizes an area of jurisdiction in relation to indigenous governments, essentially, governing bodies, which is a section 35 aboriginal rights...[and it] is founded on 91(24) as a basis for federal jurisdiction”. She also indicated that it is novel that for both sections 91 and 92 this is the first time legislatively we've sought to define these rights.

My first question is to Mr. Newman.

We quickly scanned through the bill. You talked about amendments to the Indian Act that gave jurisdiction on reserve to the provinces. I don't see anything in this bill that takes that away. Is that going to be in conflict with this particular piece of legislation? If there is something in the Indian Act that defines that, which I believe you indicated in your testimony, might that be a problem with this legislation? Is that accurate?

● (0910)

**Prof. Dwight Newman:** In my quick comments I couldn't explain section 88 of the Indian Act in full. To explain it in full it would take a couple of hour-long classes. Basically, it just provides for the general application of provincial laws of general character on reserve, subject to a number of exceptions.

If this bill were to pass, one of those exceptions would end up kicking in, so there wouldn't be a problem arising in relation to section 88 of the Indian Act per se. The broader issue is that provinces have traditionally exercised child welfare jurisdiction and this bill interferes off reserve there.

**Mrs. Cathy McLeod:** I appreciate that, because that twigged a concern. With the indigenous languages bill, for Parliament, in consultation and collaboration with indigenous peoples, to recognize section 35 rights, rather than court systems, that is perfectly appropriate. Language was also cleaner in terms of not having those provincial issues. What we did with Bill C-91, although unique and unusual, is a little different from what's happening with Bill C-92.

For example, from my interpretation of Bill C-92, if in the riding I represent there is an indigenous organization providing services on and off reserve and that is well agreed to, when those agreements are made, that makes sense. However, in the absence of those agreements, you could potentially have, off reserve, someone who is defined under the Daniels decision with no particular group who has taken on the authority under this act.

Therefore, what we are doing is imposing this legislation on the provinces, when they're taking care of off-reserve indigenous children, without any conversation. As I understand it, that is your particular area of concern, the constitutionality of doing that.

**Prof. Dwight Newman:** Yes. In a number of clauses, the bill makes statements regarding principles that apply in off-reserve child welfare contexts that would normally have been within the jurisdiction of the provinces, and it's not clear to me that they're within the 91(24) power. Those are clauses 10 through 17.

I didn't talk a lot about the issue with the delegation through indigenous governing authorities. At some level, the federal jurisdiction in 91(24) supports that. There are some complexities there, and I did reference subclause 22(3) as where the federal government is empowering indigenous communities' laws to prevail over provincial law.

The law in general engages in a recognition of section 35 rights in a way that goes beyond what the courts have said. The Supreme Court of Canada has not recognized section 35 to contain self-government rights. The Pamajewon decision in 1996 is the last authority on this and it sometimes gets left aside. The federal government has recognized self-government rights. The courts at the highest levels have not tended to do so, but that position could change.

Certainly there are some section 35 rights in the child welfare context, but the federal government putting that in legislation as a recognition by it of the contents of section 35 probably can't bind the provinces on that. It's something that would have to go to the courts.

It may be delegating powers that indigenous governments already have. To the extent it does that, there's no problem. Where it's going farther, it runs into some difficulties in terms of the relationship between federal and provincial law that would really get complicated yet.

● (0915)

**Mrs. Cathy McLeod:** Okay.

**The Chair:** There is enough time left for a short question, if you wish.

**Mrs. Cathy McLeod:** Are there ways that you believe we could craft amendments that would still meet the very important goals of the indigenous communities across this country and not end up being challenged?

I guess you can never avoid challenges through the court systems.

**Prof. Dwight Newman:** One can never avoid challenges entirely, but there are some things that strike me as possible amendments if one is working the bill as is, although there have obviously been other critiques of it that could call for other reshaping.

Thinking of it from as is, I would restrict clause 7 so that the bill is purporting to bind only the federal Crown and isn't trying to say something about the provincial Crowns, because that's not a matter for the federal government to decide. That would be an amendment to clause 7.

Clauses 10 through 17 should be amended in some way to operate subject to agreement with individual provinces, which I hope they would offer, but otherwise, to the extent that they're applying off reserve, they're running into provincial jurisdiction. Therefore, an amendment could be crafted to require provincial agreement to the off-reserve application.

Maybe there could be something of the same sort in respect of subclause 22(3), because again, once it's applying off reserve, there are some difficulties there.

I'll stop.

**The Chair:** I know you're a constitutional lawyer. It's difficult to stop.

**Prof. Dwight Newman:** True.

**The Chair:** There are a lot of angles. I don't mean to make light of that.

Thank you, Cathy. We're moving the questions to MP Rachel Blaney.

**Ms. Rachel Blaney (North Island—Powell River, NDP):** Thank you all for being here today. I think one of the major discussions underlying all of this is intent versus impact, and I think it's so important that we bring that up again and again.

Cindy Blackstock was here just earlier this week and she spoke about having the funding principles of the legislation actually put into the legislation. She suggested that they be based on the Canadian Human Rights Tribunal, which we all know is still in contention with this government.

I'm going to talk to Hadley and Naiomi first. You spoke about funding. Can you speak about that and what you think needs to be in the legislation to make sure there are at least principles of funding?

**Prof. Naiomi Metallic:** Absolutely. As I mentioned, I believe that Dr. Blackstock had a blackline version that she was circulating with amendments, and I do support those—

**Ms. Rachel Blaney:** Yes.

**The Chair:** As a clarification, Cindy Blackstock's blackline version is eight documents and it's in translation. It will come to committee members when it is done.

**Prof. Naiomi Metallic:** I've seen things in that draft that I agree with. It confirms that in the preamble there's an actual commitment, not just a recognition. It's funny because your language bill actually has a commitment to equitable, sustainable funding, and I think there should be the same commitment here.

Then I believe in clause 20, per your notes, basically it is drafted such that it does still permit fiscal discussions to happen in the context of these co-operative or collaborative agreements. However, the buck stops.

There's a provision that says, notwithstanding anything else in the act, and irrespective of whether an indigenous governing body has entered into a coordination agreement, the minister at all times shall fund the costs associated with child welfare services. It sets out various areas. There's the actual delivery of services, becoming self-governing—so developing to have that capacity—and then the actual self-governing.

I would agree that those are fundamental to this actually being at all effective.

● (0920)

**Ms. Rachel Blaney:** One of the things that concerns me is that this is a framework piece of legislation and all of you at the table here spoke about certain issues of language and how it's used, things like the best interests of the child and the concern that the legislation is hollow without substantial support and funding.

I think that's important because sometimes I hear people say, "Don't worry about that; indigenous communities will be making the legislation," but this is the framework legislation around it. Why is it so important that this be worded appropriately?

**Prof. Naiomi Metallic:** It's because it needs to be set out in law. When something is not set out in law, there is uncertainty. In the whole system, the way child welfare has worked since the mid-sixties, nothing is set out in law. There's nothing in the Indian Act about it. It leads to all kinds of uncertainty. It allows for this hot potato issue.

Framework legislation has to set out the bare minimum of content in terms of indigenous peoples' rights but also governments' obligations. If you don't set them out in legislation, it just leads to fighting and uncertainty and litigation, and in this particular context, indigenous children bearing the brunt of it.

That is why it is so key to get those really firm—funding, accountability, jurisdiction. It's so key to have those set out in law because that governs entirely how people deal with each other.

**Prof. Hadley Friedland:** What I see is that courts will be called to interpret this and they'll be looking at what came before, so having that language clear so they can see they're supposed to be doing something different here is going to be crucial when there's disagreement.

**Ms. Rachel Blaney:** Is there anything you would like to add, Melanie?

**Ms. Melanie Omeniho:** I support what they've already presented.

**Ms. Rachel Blaney:** The other thing that you talked about was accountability, and I just want to get it really clear on the record what needs to be in this legislation so that we make sure accountability is key.

I can tell you I am about 20 children's cultural care plan. I don't have time in my life to be the cultural care plan for 20 children. When I look at how indigenous children are treated when they come into care, and they bring me and my husband in and they say, "You guys are now responsible for that," without any sort of support, I just know the children are paying. They're paying and they're paying again.

What do we need in terms of accountability so that we can call everybody to account and stop seeing that hot potato of passing children around?

**Prof. Naiomi Metallic:** I would have three. A recognition of the federal obligation to fund in this area is one.

Two—and I sort of relayed it—is the level specified in the First Nations Child and Family Caring Society decision: substantive equality, with services and funding that meet their needs in circumstances that are consistent with the cultural, geographical and historical circumstance of indigenous people.

My third one is that there needs to be a dispute resolution mechanism that is effective—meaning binding decisions.

That's accountability to me.

**Ms. Rachel Blaney:** Okay, good.

The other thing that I heard was clarity for front-line workers so that they know how to implement what needs to happen.

How can we make sure the bill is strong enough so that front-line workers are seeing that being implemented? What needs to be tied to that in terms of funding and support for training and so forth?

**Prof. Hadley Friedland:** I think that drawing on the American experience can be helpful here. Certainly having support for interpreting and understanding this, for workers, for indigenous peoples as well, will be very important.

**Ms. Rachel Blaney:** This was brought up again and again: "best interests of the child".

How do we define that? What is the gap and what do we need to put in there to make sure it's defined well.

**Ms. Melanie Omeniho:** If you want to talk about the best interests of the child, I think you need to work with the indigenous communities to help identify what that is in relation to who they are. Quite often the best interests of the child have been based on a system that wasn't our system. What might have been important in a European process might not be the most culturally relevant, important thing to these children.

Having healthy, happy children is what we all want ideally, but in what system we are assessing some of that really needs to be considered. I think that working with indigenous governments and our indigenous communities is going to be the best place to put that forward, so that it isn't a system that's just fluffy words and doesn't have any impact.

● (0925)

**Ms. Rachel Blaney:** I agree with that, but how do we make sure that this framework has strong enough language to support the language that every indigenous group puts together for their own legislation? Is there an answer?

**The Chair:** Please be very quick.

**Prof. Hadley Friedland:** Okay.

In the blackline version, there's a suggestion to allow for those laws. Also I think there's the onus on whose needing to address it, and having impermissible reasoning will stop some of the binding precedent.

**The Chair:** Thank you.

The questioning now moves to MP Will Amos.

**Mr. William Amos (Pontiac, Lib.):** Thank you, Chair.

Thank you to our witnesses both here and on video.

I want to offer our witnesses, Ms. Metallic and Ms. Friedland, the opportunity to respond on the division of powers question to Professor Newman.

I'm interested in this topic. I know that there's been a charter statement tabled in the House, but that doesn't go to division of powers. I think it would be valuable to have a further discussion.

My initial thought would be that I don't think it is unprecedented that federal legislation references the provinces, so I don't think that is in and of itself untoward. I can also appreciate that we're in a unique circumstance where we're changing the status quo and we're enabling, through the framework legislation, an approach to child welfare that is going to empower those who are the most at risk, have the most to lose and the most to gain out of this set of circumstances.

I pass it over to you, Ms. Metallic and Ms. Friedland.

**Prof. Naiomi Metallic:** Thank you for the opportunity to speak to this particular issue.

With respect, I do not share the concerns of Professor Newman on this issue whatsoever. I think what he's primarily focused on is the fact that the federal government is purporting to create some national standards that would be paramount over provincial laws. The question is this: Can the federal government, on a matter of constitutional jurisdiction under 91(24), pass laws with respect to indigenous child welfare?

There are certainly places where the feds have already legislated over areas that were often viewed, maybe historically, as provincial. There are provisions on wills and estates in the Indian Act that tend to be viewed as provincial. There have been provisions on education. They tend to be viewed as provincial. Family disputes on reserve have also been viewed as provincial.

The way 91(24) is structured, it says “Indians” as one area and “Lands reserved for the Indians”. “Lands reserved for the Indians” refers to the territorial on-reserve Indian lands, and we can get into broader areas of land. However, we still have the jurisdiction over Indians, and that is not bounded by territoriality and that has to be kept in mind. Professor Peter Hogg has written about this.

The jurisdiction over Indians, first of all, has been found in the 2016 Daniels case to extend not just to Indians as well as to Inuit found in the Re Eskimos case of 1939. It also extends to non-status Indians and Métis, who certainly live off reserve, so it's not just that the jurisdiction doesn't extend that far.

Now to the question of whether jurisdiction can extend to areas classically viewed as provincial, Peter Hogg's argument is that “Of course it does. Why would we have 91(24) without it?” If the federal government could otherwise pass laws that overlap with provincial areas under its other jurisdictional power, it wouldn't need 91(24). That's why 91(24) is there. It allows the federal government to pass specific laws that ameliorate or are specific to the situation of indigenous peoples. There is clear jurisdiction or authority on that, at least from one of the foremost constitutional lawyers.

Sébastien Grammond, who produced a paper arguing for legislation in this area, also agrees with Professor Hogg. You can also go look at his writing, which shows that there is no problem with the federal government producing national standards. There is such a need for them.

The last point on this is that it's kind of ironic, given the history of jurisdictional neglect, that the provinces are not clamouring for jurisdiction in this area. They have never wanted it. They want you to have it. They don't want it. They have never wanted it. I don't think that you really have a massive risk of the provincial governments beating down your door, saying, “How dare you take indigenous child welfare jurisdiction away from us?”

● (0930)

**Mr. William Amos:** Thank you for those comments. It is clear—and it goes without saying—that the Government of Canada wouldn't be seeking to trench on provincial jurisdiction. As a lawyer and former law professor, I can appreciate that there are always going to be grey areas, particularly when you are in a new area of legislation where the federal government has traditionally not been engaged.

**Prof. Naiomi Metallic:** Yes.

**Mr. William Amos:** Professor Newman, is it your sense that there is a real risk that there will be provincial governments seeking to bring cases on the division of powers over this issue? I'm trying to get a sense of whether this is a very real risk or if this is more of an academic and theoretical risk.

**Prof. Dwight Newman:** I haven't tried to carry out a full survey of the provinces on this. I know at least one provincial government has already raised concerns with the federal government over the legislation and has asked for more dialogue around the federal-provincial interaction in relation to this legislation. If that isn't resolved in a co-operative way, I think there probably is a real risk of facing issues down the road.

I agree with the point that was made that we haven't seen provinces clamouring for jurisdiction in this area and we may not see that. To the extent that there's an expansion of federal involvement, especially off reserve, I think provinces are going to have something to say about that and as I said, at least one province has already raised concerns with the federal government over these issues.

I would just briefly add, to respond to the last comment, that there are, of course, some mixed views on the division of powers questions, generally. There are some very contested points. The scope of 91(24) has been tested out very little. Of course the federal government can set national standards when it actually has jurisdiction in an area. When it doesn't have jurisdiction, it can't set national standards. To the extent that it purports to use section 91 (24) to legislate over indigenous children, it very much gets into an area where there's room to talk about whether that is, in pith and substance, about a 91(24) matter or about a matter within one of the provincial powers.

I don't make the claim that every part of this bill is going to fall, but I think there are real division of powers questions there and I'm very concerned to hear that there was only a five-minute discussion with the Department of Justice on those. They certainly would have background materials that I think it would be proper to ask them to share further in order to get to their view more clearly on what the state of affairs is and to analyze it.

**The Chair:** Thank you very much for all of your presentations, insights, guidance and recommendations.

We have now used up our hour allocation. You are an important piece of our dialogue on the bill and part of the official public record. We take your comments and submissions very seriously.

*Meegwetch*. Thank you.