PRESENTATION TO THE HOUSE OF COMMONS STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

Bill C-428: *Indian Act Amendment and Replacement Act*

April 18, 2013

Speaking Notes
BC Regional Chief Jody Wilson-Raybould

Check against Delivery

Good morning.

Today, I am here providing evidence as the Regional Chief for British Columbia and on behalf of the Assembly of First Nations as the national portfolio holder for First Nations' governance.

As set out in the preamble to Bill C-428 there is no question that the *Indian Act* is an 'outdated colonial statute'. On that we all agree. However, for far too long our political challenge has been what to do about it? – repeal it? amend it? replace it – and if so… what with? …as well as the courage and the ability to actually do something about it.

In this regard, I commend MP Clarke's leadership in bringing forward this Bill to further stimulate the conversation around what actually needs to be done to move forward. Unfortunately, Bill C-428 is not the solution. We need strong and appropriate governance, not tinkering with the Indian Act creating perhaps an illusion of progress.

The good news is, however, First Nations do have solutions and are making progress in their efforts to move away from the *Indian Act* – despite progress being still far too slow. We need to continue developing our solutions, building on our success and what we have learned over the past 40 years from those First Nations that are already governing outside of the *Indian Act* – either sectorally (such as lands, education or finance) or comprehensively by way of self-government agreements. Additional mechanisms are needed that support our Nations at their option to move beyond the *Indian Act* when they are ready, willing and able. While the preamble of Bill C-428 acknowledges that the Indian Act "does not provide an adequate framework for the development of self-sufficient and prosperous First Nations' communities," the bill itself is not a mechanism that would move us closer to the appropriate legislative framework that would assist our Nations in comprehensively moving beyond the *Indian Act.* Senate

Public Bill S-212, *An Act providing for the recognition of self-governing First Nations of Canada* – was developed to meet this need – a bill, I hope, to be presenting on before you at some point.

Bill C-428 is an eclectic act. In addition to the requirement for the Minister to report on progress in moving away from the *Indian Act* in section 2, there are two types of amendments to the *Indian Act* that are proposed – firstly those that repeal or amend sections of the *Indian Act* that are no longer appropriate in this day and age, and, secondly, amendments that repeal or amend or add language that would design aspects of our post-colonial world for us. It is this latter group of changes that are problematic. All the more significant because the changes would not be optional and would apply to all First Nations still governed under the *Indian Act*. Unless these sections of Bill C-428 are amended or removed, the Bill should not become law. Ironically, keeping them in could even create new problems.

To review sections of C-428 in brief:

Section 2 of the Bill requires the Minister to report to this Committee on the work undertaken to develop new legislation to replace the *Indian Act*. I appreciate the intention. However, this suggests it is could be years until we actually do. Respectfully, this sends the wrong message. We have the solutions now. Personally, I am less interested in reporting on "progress" made in developing appropriate federal legislation than simply making the progress the first order of business.

It is equally important, of course, that all First Nations know what options are currently available to them along a continuum of governance reform and to opening up the post-colonial door – to know what other Nations are actually doing on the ground in terms of developing the policy framework for their post-*Indian Act* world – and what further work is required. This is why the BCAFN developed our

Governance Toolkit, which includes a comprehensive Governance Report.

The report referred to in section 2 should probably be tabled in Parliament, it is not just of interest to this committee. The section also makes reference to the report being developed in collaboration with "First Nations organizations and other interested parties" but does not define what these organizations are or whom the 'other interested parties' might be.

More generally, what constitutes adequate consultation and how deep with respect to developing federal legislation is complicated. What is required depends on the intent of the legislation (is it enabling or is it intended to govern First Nations?); and whether or not it is optional. A more considered and rigorous approach needs to be developed and our Nations are extremely upset with the consultation processes to date.

Section 3 amends the definition of reserve and is required because of other amendments proposed to be made to the *Indian Act.*

Section 4 addresses application of the *Indian Act* off reserve and removes references to sections of the *Indian Act* that are repealed later on in the Bill.

Section 5 repeals sections 32 and 33 which are paternalistic and prohibit a band or a member selling their animals or crops unless the Indian Agent approves. All self-government arrangements do away with these sections regardless of whether the Nation assumes jurisdiction over agriculture. These sections should have been repealed years ago.

Section 6 deals with "special reserves". I am not sure why this amendment is proposed? This is a complicated area of law and any tinkering with this section could have unintended consequences.

Section 7 removes those sections of the *Indian Act* dealing with wills and estates and the descent of property. This is one of the most problematic series of amendments proposed by this Bill because jurisdiction for wills and estates would automatically default to the provinces. While some First Nations may desire this, simply making provincial law applicable with respect to all Indians with no option would amount to surrender of jurisdiction and is not appropriate.

Furthermore, this is another very complicated area of law that is tied to how lands are held and administered by our Nations and really needs to be dealt with at the same time or after a Nation has developed its approach to land management – how lands are held, interests created, registered etc. All self-government agreements deal with lands as well as wills and estates.

Section 8 repeals those sections of the *Indian Act* that provide for the Minister to disallow a bylaw made by a Council under section 81 of the *Indian Act*. In principle we do not oppose this amendment, but in practice it will create challenges if not considered as part of a more comprehensive approach to Nation rebuilding.

There is a real question as to how the Nation makes its laws in the first place and the legitimacy of the institutions under the *Indian Act* making them and the scope of the law-making powers.

There are no procedures under the *Indian Act* for how Nations develop, consider and make bylaws or laws – Perhaps because it was not considered important or necessary due to the Minister's power of disallowance. However, our citizens demand that before law-making

powers are expanded and exercised by their governments that there is an open and transparent process with proper consideration of the policy rational behind any law. This good governance.

In contrast to this bill, the approach taken in Bill S-212 is that a First Nation will develop its law-making procedures as part of its constitution and this will be part of the self-government proposal that the community will ratify when voting whether or not to move beyond the *Indian Act*.

The debate we should be having is what areas of jurisdiction do First Nations want or, indeed, need to exercise and considering the existing *Indian Act* bylaw making powers should be a part of that broader debate?

Section 9 repeals the intoxicants bylaw making powers in section 85.1 of *Indian Act*. In BC, there are 32 First Nations who have made bylaws under this section. If you remove this section the existing bylaws of our Nations in this area would be invalid and our Nations would lose this power. I am sure this was not the intent of the drafters – this is a power we need, in fact we need it expanded. All self-government agreements consider governance over intoxicants. Section 9 should be deleted.

Section 10 deals with publication of bylaws and replaces section 86 of the *Indian Act* with the requirement that a First Nation publish its bylaw on the internet, in the First Nations Gazette and in a local newspaper. Again, the intention is good but the execution is lacking.

All comprehensive self-government and sectoral governance arrangements provide for the publication of laws respecting the principle that people who are affected by a law need to have access to the law and can rely on it. There are different policy considerations for

different types of laws and depending on who is subject to them. A number of approaches for publication are used. This, again, is one of those areas that our Nations need to address when they are rebuilding their institutions of government post-*Indian Act.*

Today, there are thousands of First Nation bylaws/laws – in BC alone our Nations have enacted over 2,500 – in the future there will be thousands more. The suggestion that all of these laws/bylaws can be published in newspapers is, of course, unrealistic. Similarly, whether it is appropriate that all First Nation bylaws should be published in a single First Nations Gazette published by a university law centre under the authority of a Tax Commission, also raises a number of serious policy questions.

Further, Section 10 requires that a bylaw come into force either when it is published on the internet, in the Gazette or in a newspaper – again this is too simplistic. Laws may come into force on the date set out in the law itself and not all sections of a law may come into force on the same date. Some laws may require publication before they come into force, and some, indeed, may come into force when they are published. Again, the rule will depend on the particular law and the policy objectives of the government making the law.

Section 11 repeals section 92 of the *Indian Act* which sets out that certain people acting in a fiduciary capacity cannot trade for profit with an Indian unless the Minister had given them a license to do so. This section should be repealed – as is done in all self-government arrangements.

Section 12 is a consequential amendment respecting the seizure of goods. This section would need to be amended if the power to make intoxicants bylaws is kept.

Section 13 deals with fines. I am not sure why the drafters have the fines going to her Majesty for the benefit of the band and not simply to the band itself? I would change this – this is how it is dealt with in self-government arrangements.

Section 14 repeals the offensive section 105 of the *Indian Act*.

The remaining sections of the Bill, sections 15 to 19, deal with schools. The amendments proposed in sections 15 to 17 would remove all references to religious or charitable organizations and the operation of residential schools. In my opinion, these amendments should really have been made immediately after the residential school apology. Sections 18 and 19 deal with sections 117-121 of the *Indian Act* and address attendance at school and truant officers and conflates these provisions down to simply saying a child is not required to attend school because of sickness or where they are home schooled. We would not object to these changes, however, these are again matters that are properly addressed in our own laws dealing with education and considered as part of a broader conversation about how schools on First Nation lands are governed and administered.

In conclusion, the Bill may be well-intentioned but for the reasons I have set out is flawed. If this Bill is to proceed further, I would recommend strengthening the preamble, consider more closely with whom the government is consulting with in developing its report on progress to move beyond the *Indian Act*, and to whom – parliament or committee – and not simply a progress report on federal legislative initiatives. As I have stated, I would amend or delete sections 2, 4, 12 and 13 as discussed. I would delete sections 3, 5, 7, 9, and 10 as the policy issues are far more complicated than the solutions suggested by this Bill and the changes need to be developed with our Nations. This leaves sections 8 (with my caveat there will be work required by our Nations to develop procedures for law-making), 11, 14, 15, 16, 17, 18

and 19 of the Bill which for the most part get rid of sections of the Act which should be removed.