HOUSE OF COMMONS STANDING COMMITTEE ON THE STATUS OF WOMEN

Bill S-2: *Family Homes on Reserves & Matrimonial Real Interests or Rights Act*

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Check against delivery

Good morning. My name is Jody Wilson-Raybould - my traditional name is Puglaas. I come from the Musgamagw Tsawataineuk and Laich-Kwil-Tach people of northern Vancouver Island. I am a member of the We Wai Kai Nation of Cape Mudge where I live in my community on-reserve with my husband and where I am also a member of council.

I am here today representing the National Assembly of First Nations in my capacity as the regional chief for British Columbia and as the national portfolio holder for First Nation governance. The AFN is the national political representative organization of over 630 First Nation governments in Canada.

Canada's intention to enact legislation in the area of matrimonial property is, of course, not new. I have presented twice to the Senate Committee on Human Rights – once when the Bill was S-4 and now as S-2. While S-2 contains positive changes from previous iterations, the overriding concerns I raised previously still remain.

Before I discuss these concerns, let me first say that Bill S-2 should not be characterized as a Bill dealing with women's issues and probably should not be before this committee – no disrespect intended to the members of the committee. This is because these matters are not simply women's issues. For my husband, who is in this room, and lives on our reserve, it is his issue as well. It has also been suggested that some of those who have spoken out against this Bill or are behind the opposition to it, are somehow trying to prop up a system that is unfair and benefits some at the expense of others – while there may be individuals that want to keep the status quo – this is certainly not the case for me nor for the organizations nor the chiefs that I represent.

We all appreciate that there is a legal gap in the *Indian Act* that needs to be filled. We all know many of our citizens or their spouses may be left at a disadvantage when it comes to settling a divorce, or when their spouse passes away, or when they seek access to the family home. Our criticism of the federal government's approach with S-2, as with a number of other federal bills, is not with the intent

to fix a problem, but rather how the government considers it acceptable to design our post-colonial governance for us. So our contention with Bill S-2 is not about the need to fill a gap in the law but rather who is filling that gap and with what rules.

Family and divorce law, wills and estates and land law generally are complex at the best of times. When applied on-reserve and governed under the *Indian Act* they become even more complex. When considered in light of Indigenous legal traditions and our challenges of decolonization, the issues become even more so. Ideally, matters such as matrimonial rights and interests should not be considered in isolation from other areas of inter-related law but rather addressed comprehensively when our Nations are rebuilding comprehensive governance reform moving beyond the *Indian Act.*

Having said this, I do appreciate that the federal government wants to do something now about filling the gap regarding MRP. This is not without risk as the federal government is walking a legal tightrope by making laws in areas many people, including legal scholars and our leadership, assume are a part of our Nations' inherent right of self-government and protected under Canada's constitution – and also to do so without our free, prior and informed consent as articulated in section 19 of the UN Declaration on the Rights of Indigenous Peoples. In the past and despite its best intentions, I have called the government's current approach to legislative reform 'neo-colonial' – I know others do not see it that way. There certainly seemed to be a number of conflicted senators when I presented on this Bill at Senate committee – who on the one hand wanted to do something to fill the gap but on the other were concerned about being paternalistic. This work is not easy.

For our part in 2006 the AFN coordinated a number of dialogue sessions with our First Nation citizens on how to approach the division of matrimonial property. The following were the main issues that came forward:

1. Recognition of First Nations' jurisdiction
2. Access to justice and dispute resolution and remedies; and

3. Addressing underlying issues such as housing shortages and lack of access to temporary shelters.

These have since been confirmed and reiterated in resolutions of our chiefs in assembly.

With respect to jurisdiction; the promise of rights recognition and reconciliation of section 35(1) of the *Constitution* should require, for legal certainty, the explicit recognition of First Nations' inherent right of self-government as part of any legislative solution and where such powers are not delegated. This should include recognition of the full range of powers necessary to effectively govern matrimonial property. Bill S-2 goes part way in this direction by recognizing the jurisdiction of First Nations to make laws in the area of matrimonial property. However, the Bill is not optional and until such time as a First Nation exercises this jurisdiction, provisional rules designed by Canada will apply.

Under Bill S-2, one of the most significant changes between S-4 and S-2, and something that we requested, is that the provisional rules will not come into force for one year, giving our Nations a chance to develop their own laws before the provisional rules apply. I note, we had asked for longer. Assuming the bill becomes law, it is our intention to do whatever we can to assist those Nations that want to enact their own laws before the provisional rules apply and, if not by then, as quickly as possible thereafter.

Unfortunately, in the absence of a comprehensive self-government option, our Nations will have the same challenges as Canada had in developing the provisional rules, when trying to figure out how to fit the round peg of a matrimonial property law into the square hole of the *Indian Act.* These challenges include reconciling the system of land tenure under the *Indian Act* with the extra-legal, the informal rules for customary interests in land that exist outside of the *Indian Act,* the challenges of wills and estates, and simply trying to harmonize a Nation's law with applicable provincial family law that may be at play at the same time.

With respect to recognition of broader jurisdiction and implementing the inherent right of self-government, we will continue to develop and advocate our own comprehensive governance solutions that support our Nations moving beyond the *Indian Act* – not simply the piece meal and stove-piped approach the government is currently following. Where our Nations have made MRP laws, they have done so either under a land code made in accordance with the Framework Agreement on Land Management or under self-government arrangements, where the various aspects of the law can be considered in the context of broader powers of self-government.

With respect to the second point, access to justice, dispute resolution and remedies, there is no question that figuring out the provisional rules, seeking an order and then enforcing that order will be challenging for many of our citizens. Seeking a remedy in court under Bill S-2, will, we believe, be more expensive than for persons living off-reserve. Due to significantly lower levels of income on reserves, it will, therefore, be even more difficult for many couples to access the new remedies. Legal aid systems across Canada are chronically underfunded and are not meeting current needs, let alone future demand created by the potential adoption of this legislation.

The remedies with respect to the provisional rules rely on access to provincial courts. The general assumption of access to provincial courts is unfortunately not practical or realistic in many parts of the country.

Furthermore, with respect to enforcement, preliminary research we have uncovered shows a correlation between increased harassment and threats of violence against women who file for protection orders in instances where there are issues with their enforcement. We question the capacity and ability of such protection orders to be actively enforced, particularly in remote communities with limited access to police services. A law – any law – is only as good as the ability to enforce it.

The problem of access to courts, appropriate dispute resolution and enforcement generally has been one of the impetuses for First Nations to develop their own justice systems. It is important to empower our Nations in doing this work themselves, particularly given better opportunity for success in enforcing their own laws. While S-2 is explicit on the authority of provincial courts to hear disputes in relation to the provisional rules, it is not as clear with respect to the access to justice for First Nations under their own MRP laws; both with respect to the extent of the First Nations jurisdiction and how a First Nation could rely on the provincial or Federal Courts to enforce its laws if it so desired. The Bill would have been stronger had these concerns we raised previously been addressed. At some point, we must tackle this issue.

Pushing forward this legislation in absence of a more comprehensive approach to community safety and governance could arguably increase the risk to women and children in First Nation communities that do not have their own MRP regimes. At the very least, given the provincial courts will have increased responsibility to deal with matters under Bill S-2, Canada must undertake to ensure that the provincial courts understand their new role, budget and plan accordingly.

The third area, identified by the AFN was the need to address underlying issues that lead to disputes in the first place. Providing better prevention support, as well as adequate emergency and second-stage housing has been identified as a requirement. Chronic housing shortages on many reserves must also be addressed. When couples living on-reserve separate, the lack of alternative or affordable housing for the spouse who is not granted occupation of the family home will be an issue. Legislative reform in itself does not significantly improve the lives of our communities and our people. Particularly if these changes to legislation are not the design of our communities – decolonization is multifaceted.

In closing, the Canadian Bar Association made a number of helpful recommendations for amendments to the Bill when it was S-4 – several of these were acted upon. I would recommend the committee revisit these recommendations with an eye to making further amendments as appropriate.

Further, Bill S-2 can and should only be viewed as an interim measure which, unfortunately, may prove to have more limited benefits that its strongest advocates would suggest. We must therefore focus our efforts on working with First Nations to support Nation rebuilding in a way that meets their needs and provides the safeguards and equal opportunity that I believe we all seek.