Presentation to Standing Senate Committee on Human Rights

Re:

Bill S-4 - *An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*

Submitted by

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I. INTRODUCTION

Thank you for inviting me to speak to you today on *Bill S-4 - Family Homes on Reserves and Matrimonial Interests or Rights Act.* I would first like to acknowledge the traditional territory of the Algonquin peoples on whose lands we are meeting. My name is Pam Palmater and I am a Mi'kmaq woman who family originates from the Eel River Bar First Nation in northern New Brunswick. I have been a practicing lawyer for over 12 years, have worked for the Nova Scotia Human Rights Commission and am currently the Chair of Ryerson University's Centre for Indigenous Governance.

I completed a doctoral degree in Aboriginal law, specifically dealing with constitutional and human rights as they relate to the status and membership provisions of the *Indian Act*. I recently appeared as a witness before the Standing Committee on Aboriginal Peoples (AAON) on *Bill C-3 Gender Equity in Indian Registration Act* which relates specifically to gender discrimination in the *Indian Act, 1985*.[1] My area of expertise is Aboriginal law, policy and governance. It is my opinion that in order for *Bill S-4* to effectively address gender discrimination depends a great deal on whether gender discrimination is addressed in *Bill C-3* which, in its current state, will not.

The practical reality for many Aboriginal peoples is that they are also working on numerous other issues like *Bill C-3* (registration), *Bill C-24* (FNCIDA amendments), *Bill S-11* (Safe Drinking Water), the *First Nations Land Certainty of Title Act*, and the repeal of section 67 of the *Canadian Human Rights Act* (*CHRA*).[2] Here in Ontario, First Nations must also deal with the new HST legislation and the proposed *Far North Act*.[3] I think it would be safe to say that the majority of First Nations do not have the capacity to deal with this bombardment of new legislation.

INAC appears to be rushing this legislation through the process by introducing multiple bills in the House and the Senate at the same time. This does not allow sufficient time for most First Nation communities to become informed or to determine how best to advocate on their own behalf. It is therefore critical that this committee see the issue in its broader context and why First Nations are making their right to be consulted such a priority in their submissions before you. The issue is not how "to please the Chief and Council", it is about Canada's legal obligations and basic concepts of fairness.[4]

I am not here as anyone's legal counsel nor am I speaking on behalf of any political organization. I am here today representing my large extended family who have all been negatively impacted by the discriminatory status, membership, elections, residency, land possession, and estates rules of the *Indian Act*. **It is because the current bill does not address the real issues behind the discrimination faced by Indian women and their descendants that I speak against *Bill S-4* today.** I will not be repeating the history of this bill, nor will I repeat the Canadian Bar Association's (CBA's) presentation or that of family lawyer Ms. Mackinnon. Aboriginal witnesses have already appeared before you and made some very important points in relation to the bigger issue of Canada's relationship with First Nations and their inherent right of self-government. My goal is to challenge some of the underlying assumptions and fundamental flaws of *Bill S-4* and make recommendations on to address them.

GENDER EQUALITY

To my mind, the issues in *Bill C-3* and Bill *S-4* are inextricably bound with one another. Each bill relies on the other to fully address gender inequality, such that problems with either bill will negatively impact the other. By way of example, my grandmother, Margaret Jerome, who was born and raised on Eel River Bar First Nation, married a non-Indian. As a result, she could not be registered as an Indian (also referred to as status) or a band member and was therefore forced to leave the reserve and give up her home and her possessions. This also meant that my father, Frank Palmater, could not be a status Indian or band member and had no rights to live on the reserve. Matrimonial real property legislation would not have changed that fact for either my grandmother or my father as it deals with rights after marriage breakdown.

In 1985, *Bill C-31* reinstated the status of thousands of Indian women and their children.[5] It also allowed bands to assume control over their own membership if they so chose. However, Canada included a provision in the *Indian Act* which allowed bands to exclude the children of reinstated Indian women from membership if they acted before 1987. Some of the bands did so and my band was one of them. Therefore, even though my grandmother and father were reinstated as Indians, because my father was a section 6(2) Indian, he was barred from membership. No matrimonial legislation would have changed this fact. This was about legislative exclusion from identity, membership, and the right to live on the reserve.

Canada has introduced *Bill C-3* to register up to 45,000 people as a result of gender discrimination in the registration provisions of the *Indian Act* as found in the *McIvor* appeal decision.[6] However, that bill will not address the full extent of the discrimination found in the Court of Appeal case in *McIvor* between the descendants of double mother clause (DMC) and section 12(1)(b) reinstatees.[7] The majority of DMC descendants will have better status (or any status) than the descendants of reinstated Indian women.

Therefore, by not fully addressing even the limited gender discrimination found in *McIvor*, *Bill C-3* ensures that Indian women and their descendants start out from way behind the equality line. *Bill S-4* speaks about entitlements to homes on reserve once a marriage breaks down, yet there are thousands of Indian people who don't have a right to live on reserve in the first place and this will not be addressed in either *Bill C-3* or *Bill S-4. Bill S-4* only provides protections for those who have a right to live on the reserve in the first place and will create new entitlements for non-Indians.[8]

As a result, *Bill S-4* will only compound the inequality suffered by Indian women and their descendants so long as *Bill C-3* is not amended. Additionally, if both bills are left as they are then non-Indian people will continue to have better rights than Indian people. *Bill C-3* privileges non-Indian women who married in and non-Indian children who were adopted over the descendants of Indian women who married out in that they have better rights both to (1) transmit their status and membership to their children and to (2) live on the reserve.

These two bills taken together do not advance gender equality for Aboriginal women. It was the Minister himself who asked this committee to look at *Bill S-4* in the broader context of its other legislative initiatives, like *Bill C-3*.[9] I respectfully ask that this committee do just that.

INAC'S POSITION:

Minister Chuck Strahl appeared before your committee last Monday, May 31, 2010 to speak to the merits of *Bill S-4*. I won't repeat his presentation, but will highlight some of his main points which I took directly from the transcript:

(1) "There is not a more vulnerable group, arguably, than Aboriginal women in this country" and they need "immediate protection".[10]

There can be no doubt that Aboriginal women are the most vulnerable group in Canada. Numerous reports, studies, social science literature, and census after census have come to the same conclusion.[11] The Supreme Court of Canada confirmed this fact in *Corbiere* when it held that Aboriginal women are "doubly disadvantaged" on the basis of gender and race.[12]

Given that INAC recognizes that this is the case, one might wonder why gender discrimination is not being fully eliminated in any and all legislative initiatives that it is currently promoting. *Bill C-3* is a historic opportunity to address gender discrimination once and for all. Yet, INAC is ignoring the near unanimous input from the witnesses that they should amend *Bill C-3* to address gender discrimination more fully. This will negatively impact any remedies provided in *Bill S-4*.

The Minister also said that Aboriginal women are in need of "immediate protection".[13] If the Minister actually listened to the voices of Aboriginal women, he would have heard that Aboriginal women do not want *Bill S-4* as it currently drafted. He would also have heard that what they do want is gender equality addressed in all of Canada's legislative initiatives, including *Bill C-3*.

I can't think of many Aboriginal women who would sacrifice their Aboriginal and treaty rights, the inherent right of their First Nations to be self-determining, or the reserve and title land rights of their children and grandchildren for seven generations into the future, for their own immediate needs. This is why you see Aboriginal women willing to forgo their immediate right to be registered under *Bill C-3* in order to ensure that the *Indian Act* is amended to protect the future rights of their children and grandchildren. The situation with *Bill S-4* is no different. Aboriginal women want their rights protected but in a way which also respects their First Nations' jurisdiction in MRP.[14]

The Ministerial representative for MRP is a well-respected professional woman who compiled a substantial set of recommendations based on what she heard from the AFN and NWAC and independent research/legal reports on matrimonial real property issues on reserve (MRP). Yet, the bulk of her recommendations were not incorporated into *Bill S-4.*[15]

NWAC, which has represented the voice of Aboriginal women in Canada for many decades, testified that their recommendations were not incorporated into *Bill S-4*. One of those recommendations related specifically to addressing gender inequality issues in the status provisions of the *Indian Act* (*Bill C-3*) and therefore NWAC does not support the bill as currently drafted.[16]

Six Nations brought one of their women leaders Ava Hill, a band councillor, to explain what their community has done with regards to MRP and law-making. She testified that their community does not want or need federal imposition of MRP laws in their community and that the content of *Bill S-4* is racist in that is makes requirements of First Nations not made of other governments.[17]

Grand Chief Randall Phillips of the Association of Iroquois and Allied Indians (AIAI) read letters from two of AIAI's women chiefs who argued that *Bill S-4* does not provide real remedies for Aboriginal women, but instead will increase poverty on reserve and will promote community divisions that will erode the collective unity of First Nations.[18]

Chief Julie Phillips-Jacobs of the Mohawk Council of Akwesasne also testified that their First Nation has their own process for law-making and that they already have their own detailed process by which they draft laws and consult with their community members. She testified that their process is much more holistic as they draw in community members and representatives from housing, social services, justice, nation-building, and vital statistics.[19] *Bill S-4* does not deal with the matter of MRP holistically or address potential impacts on related areas.

In 2007, the collective of First Nations Women Chiefs and Councillors issued a consensus statement about federal MRP legislation saying that they would no longer tolerate government interference in their lives anymore. This group who represents over 860/3179 Chiefs and Councillors in Canada (27%) stood united to oppose the unilateral imposition of MRP legislation by Canada on their communities.[20] (Grant-John also noted that First Nations have more women leaders than the Parliament of Canada, which only has 20% of their seats filled by women.)

There has been no evidence presented to counter their collective voices. To say that Aboriginal women are too scared to come forward and testify is to paint all First Nations with the same old negative stereotypes that the Ministerial representative warned us against. She also countered the other problematic assumption which underlies this bill - that First Nations governments are more likely to violate individual rights than federal or provincial governments:

> *First Nations governments are just as responsible, accountable and transparent as other governments in Canada. Further, the law-making and decision-making of First Nation governments will be subject to human rights review at several levels: the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, international human rights standards, indigenous visions of human rights and the natural impulse of First Nation leadership to do right by their citizens. It would be a double standard to say the least if First Nations were made subject to prescriptive standards beyond these, based on come assumption that First Nation governments will take as long as the federal government to act on the subject of matrimonial property.*[21]

First Nations are no more likely to commit equality violations than is Canada. That being said, Canada needs to find a way to support First Nations to develop their own laws to address these problematic areas - not impose a one-size-fits all solution that does not respect anyone's rights.

(2) *Bill S-4* "clearly states that it is not intended to affect title to the lands or to change the status of collective reserve lands."[22]

The Minister says on the one hand that *Bill S-4* will clearly not "affect the title to the lands or change the status of collective reserve lands", but on the other hand he admits that there are provisions that will "touch" on those rights.[23] Despite the Minister's conflicting assurances regarding reserve land protections, *Bill S-4* will not only create new interests in reserve lands, but it will also create new entitlements for non-Indians to those lands.[24]

Reserve lands are set aside for the use and benefit in common of a particular Indian band.[25] Reserve lands are inalienable except to the Crown over which it has fiduciary and other legal duties like the duty to consult and accommodate.[26] Various sections of the *Act* provide that Indians can be in possession of reserve lands, the specific land interests which are available (Certificates of Possession, Certificates of Occupation, locatee leases, designated lands, etc) and that non-Indians can be charged with trespassing if they are in possession of reserve lands.[27] Other reserve land holdings, like customary allotments and traditional/clan-based holdings, are not properly considered in *Bill S-4*.

Bill S-4 does not adequately protect the collective rights of First Nations in their reserve lands. The inalienability of reserve and title lands for the collective benefit of Indian bands has a long history. First Nations now occupy less than 1% of their traditional territories. Canada is one of the wealthiest countries in the world because of the substantial benefit it reaps from the lands and resources stolen from First Nations. First Nations collective rights to their land is not something that should be taken lightly as they are protected by the *Indian Act*, section 35 of the *Constitution Act 1982* and numerous treaties.[28] Canada, through *Bill S-4* lacks the requisite authority to unilaterally change the essential characteristic of reserve lands - and it certainly can't do so without formal legal consultations with First Nations.

A temporary order to allow a non-Indian to occupy a home and/or reserve lands after marital breakdown in an emergency, due to violence or after the death of a spouse, which is limited to 90 - 180 days seems to be a reasonable interim balance. However, an exclusive possession order which could see a court order possession for many years at a time to a non-Indian is necessarily inconsistent with reserve land interest under the *Indian Act* and Supreme Court of Canada (SCC) decisions which have held that the reason why Aboriginal rights (including title lands) are protected is because of the "Aboriginality" of the claimant.[29]

Even if the order was for a finite period of time (say 10 years), this is a new interest in land (up to a life interest) available to non-Indians that could interfere with the right of First Nations to the use and benefit of their collective reserve lands. By way of example, leasing may only be for a finite period, but it still requires a fully informed conditional surrender and a community referendum. Even a section 28(2) permit to allow non-Indians to occupy reserve land require the consent of the First Nation for any period over one year. The implications of *Bill S-4* have not been fully examined in light of section 89 and other provisions of the *Indian Act,* Aboriginal and treaty rights, section 35 of the *Constitution Act, 1982* or the Crown's fiduciary and consultation duties. **This makes *Bill S-4* fatally flawed.**

(3) "No one wants to be thrown out in the middle of the night... However the First Nation has collective rights".[30]

Statements like this give the general public the wrong idea about First Nations governments and communities. It also acts to misinform the public about the nature of the interests that must be balanced in MRP. No witness before this committee is advocating that anyone be thrown out in the middle of the night as a result of marriage/relationship breakdown. I personally wouldn't want that to happen on or off-reserve, to Indians or non-Indians.

The Minister's unfortunate statement implies that this situation is so rampant in First Nation communities that emergency legislation which forgoes consultation is absolutely necessary. The testimony of Six Nations alone counters that idea. It is important that we base our assessment of *Bill S-4* on the facts and not on assumptions, anecdotes, political spin, or negative stereotypes.

Furthermore, it is not the collective nature of a First Nation's reserve land or their inherent right to be self-determining that has resulted in the lack of MRP protections in the *Indian Act*. The *Indian Act* was imposed on First Nations and even now the Minister says he can't recognize the right of First Nations to make their own laws in this area. Therefore, if any government needs to be closely scrutinized for human rights violations, it is Canada, not First Nations.

Nor is the choice that INAC must make with regards to MRP laws one of addressing middle-of-the-night homelessness or supporting First Nation self-government. One could just as easily make a case for increased housing funding to address the issue of where people live on marriage breakdown. There is no reason why MRP protections and self-government must be inconsistent so long as the rights of First Nations to assume jurisdiction in MRP are equally protected.

Even the Minister's Special Representative explained balancing between collective and individual rights this as a false dichotomy:

> *Too often, the debate has been framed by an assumption that First Nation people must necessarily choose between their collective rights in land or to govern themselves on the one hand, and the enjoyment of human rights to equality and dignity on the other. It is time for a new direction and new policies that do not insist on such a false choice being presented to First Nation people over and over again.*[31]

The introduction of *Bill S-4* is premature. What is required is proper funding to help First Nations build capacity and participate in their own law-making processes with their citizens. First Nations should at least be given the same benefit of the doubt given to Canada and not be held to higher standards than the federal and provincial governments with regards to human rights.

It has taken Canada over 100 years to get around to considering MRP rules for the *Indian Act* - First Nations deserve at least a three year transition period to develop their own laws before any type of transitional legislation is imposed on their communities. First Nations deserve no less than the same allowance Canada has had or than what they received with the CHRA.

(4) "*Bill S-4* must be seen for what it is" - the removal of "obstacles that prevent Aboriginal people from participating fully in Canada's prosperity".[32]

There is nothing in *Bill S-4* that removes obstacles for Aboriginal peoples so they can enjoy the prosperity enjoyed by Canada from First Nations lands and resources. This bill is not about implementing treaty rights, settling long outstanding land claims, or sharing the billions of dollars in revenues made from hydro, gas, minerals, exports, and other Canadian industries which rely on First Nation lands and resources.

This bill also does not address the 2% funding cap for First Nations funding, nor does it provide adequate funding for child and family services, housing, or clean water on reserve. The Minister also did not commit to providing capacity-building funding for First Nations with regard to any of these social areas. This is despite the fact that Canada itself has said that programs like post-secondary education are the key to helping life First Nations out of poverty. How then, does *Bill S-4* address the real barriers to First Nations prosperity?

In fact, what we heard from the witnesses so far is that this bill will have devastating financial consequences on First Nation communities. The poorest of the poor in this country will be forced to pay their ex-spouses for the value of a home that they do not own. How would one expect an individual on social assistance to apply for and obtain a loan to pay for a house that she does not own or for which she has never paid rent? Some witnesses have said that this bill will increase not only the level of poverty on reserve but will also cause further divisions in communities.[33]

What this bill will do is create new interests in reserve lands for non-Indian people that, contrary to the above statement, will not allow Aboriginal people (which comprise only 5% of the population) to enjoy the prosperity enjoyed by non-Aboriginal Canadians (which comprise 95% of the population), but will instead force First Nations to share what little they have left with the rest of society.

Looking at all possibilities, this bill could have the effect of creating a higher entitlement for non-Indians over Indian women who may be band members and have been on a housing waiting list for 10 years but will not be entitled to that house because of the non-Indian entitlement.

What the Minister has also failed to see is that when Canada ignores the Aboriginal and treaty rights of First Nations, they also do so for Aboriginal women. Aboriginal women are an important part of their communities and if Canada, through *Bill S-4*, denies their communities their right to be self-governing, it also denies that right to Aboriginal women.

Bill C-3 as currently drafted will not allow Indian women the right to transmit their status and membership to their children and live on reserve equally with Indian men. *Bill S-4* will simply perpetuate that inequality. As the Minister has already stated, these two legislative initiatives must be viewed together. Viewed together, the fatal flaws in both bills will set Aboriginal women back decades in terms of their property and civil rights on reserve.

(5) "There was an extensive process of consulting on this bill" which included engaging a special representative.[34]

This statement is contradicted by the Minister's own special representative as well as the majority of witnesses who have appeared before this committee to date. In fact, the Ministerial representative, Wendy Grant-John noted that INAC has denied having a legal duty to consult on MRP and refused to explain the basis upon which it came to that conclusion.[35] This made it difficult, if not impossible for First Nations to address the issue of consultation in any meaningful way.

Grant-John also pointed out that the SCC in *Haida* held that the duty to consult arises when the Crown becomes aware of the potential existence of an Aboriginal right. In this case, INAC has noted on several occasions that First Nations have collective rights protected under section 35 of the *Constitution Act, 1982*. She further noted that the SCC decision in *Taku* held that the duty to consult could not be delegated to a third party and that *Mikisew Cree* stands for the proposition that the Crown must consult directly with individual Treaty Nations.[36]

In the present case, Canada engaged a third party to engage with other third parties, namely the AFN and NWAC. INAC admittedly did not consult directly with First Nations due to the number of First Nations in Canada.[37] Yet, the SCC has consistently held, in the context of Aboriginal rights, that administrative difficulty or increased cost is no defense for the failure to consult with Aboriginal peoples on potential infringements of their rights.[38]

Bill S-4 is 45 pages long and contains over 60 new provisions. This is a significant piece of complex legislation that could impact equally significant *Indian Act* and constitutional rights. I think the relevant question is whether a draft of this bill was provided to individual First Nations for review and input and whether Canada solicited amendments from First Nations prior to it being introduced in the Senate? Were there were individual meetings with First Nations where INAC representatives took the time to explain the intent and impact of each section? Were any impact studies done that were shared with individual First Nations that indicated how this legislation would impact their communities? Were examples shared with First Nations so that they could understand how the *Act* would work?

If the answers are no (and it would appear from the Minister's testimony that the answer is no), then I would argue that Canada has breached its duty to consult and accommodate First Nations views on this important bill. Even the CBA recommended that *Bill S-4* not go forward without consultations with First Nations:

> The CBA recognizes that Bill S-4 represents an important step forward to address systemic problems with MRP interests on reserves. However, the implications of Bill S-4 over inherent rights of self-government and over First Nations citizens and reserve lands call for in-depth consultation before the Bill proceeds further in the legislative process. Federal decisions concerning reserve lands engage the Crown’s fiduciary duty, again requiring national consultation with First Nations and representative organizations..[39]

Even the basic obligation to ensure that First Nations are fully informed about the bill has not been met. By way of example, I have been working on citizenship issues my whole life. I have studied and worked with the Indian status and membership provisions of the *Indian Act* extensively and wrote a 700-page doctoral thesis in that area. Despite my familiarity with registration, it took me a great deal of time to fully understand and assess the actual legislative implications of *Bill C-3*.

I have 8 sisters and 3 brothers, most of whom have been active in Aboriginal politics their whole lives and have been working on *Bill C-31* issues since the 1980's. I have been working with them on *Bill C-3* since it was introduced in March of this year. Yet, they still cannot explain the implications of that bill - so I doubt the majority of individuals who are impacted understand it much better. But one must keep in mind, *Bill C-3* is only 8 pages long and contains only 10 amendments that primarily deal with one main section of the *Indian Act*.

Bill S-4 on the other hand, is 45 pages in length and contains 60 new legislative provisions that interact with numerous complex provisions of the *Indian Act* dealing with reserve lands. These provisions involve a complex interplay between property, family, Aboriginal, constitutional, human rights and administrative law. How can the Minister expect the majority of First Nations to understand the bill let alone agree to it - if he has not consulted with them?

Canada has not provided a draft of *Bill S-4* to each individual First Nation with a view to preparing for consultations. It has not sent individual First Nations explanatory documents outlining how each section of the draft bill is intended to work, nor has it prepared impact studies to inform First Nations how their communities will be impacted.

Since Canada has also not provided funding to First Nations for this purpose, then I am left wondering how, in good faith, the Minister could say that there was extensive consultation on this bill or even how he expects the majority of First Nations to be able to advocate on their own behalf?

Holding engagement sessions with several political organizations on the issue of MRP in general, is a far cry from holding actual consultation sessions specifically on *Bill S-4* with individual First Nations. Consultation simply was not done in this case and even if the Minister believes there is no duty to consult, there is at a minimum, a moral duty to ensure that First Nations even understand what this new bill means and how it will impact their communities.

(6) If First Nations have or develop their own MRP codes, the Minister "cannot recognize it, the courts cannot recognize it and no one can recognize it".[40]

On the one hand, there have been questions throughout this process which imply that First Nations could have and should have been "lining up" to develop their own MRP codes prior to the introduction of this bill, but on the other hand, the Minister claims that even if they had, INAC would not recognize them.[41] Comments like these ignore the practical reality in most First Nations with regard to their extreme lack of funding and capacity.

The Auditor General Sheila Fraser recently noted that INAC requires First Nations to file over 60,000 reports a year, which is equal to 1 report every 3 days and this is just in relation to INAC funding. She further noted that INAC admitted that they don't even read all these reports. Fraser also reported that INAC does not monitor and enforce the current regulations they have under the *Indian Act.* [42] There is no indication from INAC that they would do any better with *Bill S-4*.

Fraser also testified before Senate that she has been highlighting the serious needs in First Nations with regards to housing, education and water safety year after year, but there has been little to no progress on INAC's part in addressing these serious issues. The 2% funding cap does not account for inflation, population increases in First Nations and the rising salaries to sustain the INAC bureaucracy - which means that First Nations budgets have actually been shrinking since 1996.[43] INAC is doing less for more money and First Nations are paying the price.

Now INAC has announced a new Centre of Excellence which will be a national in scope and no doubt create additional staffing costs to the already heavy bureaucracy at INAC. Lack of adequate funding for governance activities preserves the status quo - First Nation don't have the required funding so they can't develop laws which means INAC will continue to do so on their behalf. A Centre of Excellence will be staffed up and funded to support INAC capacity in this area, not that of First Nations.

First Nations did not receive funding to help develop band membership codes after *Bill C-31* in 1985 and as a result, the majority of First Nations do not have their own codes which means the *Indian Act* provisions remain in force. Similarly, no money way provided to First Nations to review their by-laws and other codes for compliance with the CHRA after the repeal of section 67. Not surprisingly, most First Nations have not amended their laws or prepared for potential human rights claims despite the looming June 2011 deadline before the CHRA will apply to First Nations.

This situation is repeating itself with *Bill S-4* - no funding has been committed to First Nations to develop their own MRP laws. It should come as no surprise then if many First Nations do not enact their own MRP codes and that the "transitional" or "interim" rules in *Bill S-4* become the status quo.

If there was a sincere desire to help First Nations move forward with their nation-building activities, then funding would be provided for the development of codes, laws, and policies to help them achieve their goals of self-sufficiency and good governance. Even without funding, INAC could have just as easily created a bill which would specifically provide for the paramount

jurisdiction of First Nations over property and civil rights on reserve and had specifically allowed them time to create their own laws prior to the coming into force of the bill.

To say that Canada or the courts can't recognize First Nations jurisdiction to enact their MRP laws on reserve is to say that Canada has no legislative authority under section 91(24) of the *Constitution Act, 1867,* that section 35 of the *Constitution Act, 1982* is not the supreme law of the land, and that all decisions of the SCC have no legal application here in Canada. If the right to self-government is indeed protected under section 35 of the *Constitution Act, 1982*, as acknowledged by Canada in its inherent right policy, then Canada should actively consult with First Nations before it proceeds any further with this bill.

(7) *Bill S-4* is the "perfect resolution".[44]

This statement by the Minister is the most surprising of all. Respectfully, he could only come to that conclusion if he ignored the recommendations of the Minister's Special Representative, the views of Aboriginal women leaders, the views of NWAC, the views of the majority of First Nation witnesses, and the colossal failures of the previous incarnations of *Bill S-4*, namely *Bill C-8* and *C-47*.

The AFN testified that *Bill S-4* is flawed and that it should be amended to recognize First Nations jurisdiction over property and civil rights on reserve and for Canada to move forward on implementing a more comprehensive approach to self-government.[45]

The NWAC testified that while matrimonial property legislation is needed, they do not support the bill as it reads now because *Bill S-4* will not result in full equality for Aboriginal women and does not include respect for the First Nation collective right to self-government.[46]

AIAI testified that this bill is "a continuation of oppressive policies and legislation which undermine First Nations right to be self-determined and self-governing" that will increase poverty and divisions within their communities.[47]

Six Nations testified that "The very people the government say it is enacting this law for, the Aboriginal people - and in particular, Aboriginal women in Canada - are against this bill" and that they will not recognize its application in their territory.[48]

Akwesasne testified that their community is situated within Canada, the US, Quebec and Ontario and therefore the only way to achieve harmonization of laws in their community is to enact their own laws.[49]

The Chiefs of Ontario asked the committee to "wholly reject this legislation, Bill S-4" because there were no consultations directly with First Nations, the bill itself which is being imposed is colonial and racist, and it violates section 35 rights of First Nations to be self-governing.[50]

Both individual witnesses, Ms. MacKinnon and Eberts both agreed that this legislation does not recognize the inherent right of self-government or First Nation jurisdiction in this area. The CBA echoed those viewpoints and recommended that the bill not go forward without consultations.

While CAP may have offered support for this bill, their constituents live off-reserve and are not directly impacted by this legislation. Even CAP testified that INAC "continues to this day" with their "paternalistic approaches to decision-making".[51]

The CHRC raised questions about whether First Nations have the capacity to enact their own laws and if this could defeat the entire purpose of the bill being transitional in nature and that requirements like a ratification vote and verification officers might lead to human rights complaints.[52]

None of the testimony presented before you to date supports the Minister's characterization of *Bill S-4* as the "perfect resolution".

III. BILL S-4

While I have numerous technical difficulties with various sections of *Bill S-4*, Ms. MacKinnon and the CBA have covered the majority of those in their presentations. There is no need to repeat any of those here. There is also no point in me making specific recommendations on how best to balance the rights of Aboriginal men, women and children with those of non-Indians and First Nations governments, as the bill is so problematic as it reads now that it should be withdrawn.

The following represents the key areas of concern that I have with *Bill S-4*:

(1) While INAC did engage an independent person to represent the Minister to work with AFN and NWAC to engage on the subject of MRP, INAC did not meet their legal duty to consult with First Nations specifically on *Bill S-4* and accommodate their legitimate Aboriginal and treaty rights and other interests in relation to their reserve lands.

(2) This bill does not respect Aboriginal and treaty rights in relation to First Nation's inherent right of self-government which is protected in section 35 of the *Constitution Act, 1982* that gives First Nations paramount jurisdiction over property and civil rights (including MRP) on reserves.

(3) Regardless of whether INAC thinks there is a legal duty to consult, there is a legal and moral obligation to ensure that First Nations at least understand how each section of this very large, complex bill is intended to work and how their communities will be impacted by this bill, that was not met in this case.

(4) Further, INAC is ignoring the voices of Aboriginal women, organizations and First Nations that have spoken about MRP generally, the majority of which have also spoken out against the imposition of *Bill S-4* on their communities.

(5) This legislation does little, if anything, to truly combat gender inequality for Aboriginal women. By refusing to amend *Bill C-3* to fully address gender inequality, the descendants of Indian women will continue to be excluded from status, membership and the right to live on the reserve in the first place which means *Bill S-4* will only perpetuate this gender inequality.

(6) *Bill S-4* contains legal remedies that would have to be exercised through the courts, knowing that the majority of Aboriginal women on reserve will not be able to access those courts or the lawyers needed to assist them. This results in an empty shell of a legislative right or protection.[53]

(7) The fundamental characteristics of Aboriginal title and reserve lands being inalienable and reserved and protected for the exclusive use of First Nations is not respected in *Bill S-4*.

(8) This bill does not accommodate the right of First Nations to develop and enact their own MRP laws and dispute resolution mechanisms according to their own laws, traditions, customs and priorities, as *Bill S-4* prescribes how this will be done (as per an INAC verifier) and the nature of their content (can't be inconsistent with *Bill S-4*).

(9) There is no corresponding funding commitment from INAC to assist First Nations develop their own codes. With *Bill C-3*, there was a commitment to establish a joint process to work jointly on issues related to status and membership and with *Bill C-31* there was a corresponding commitment to provide extra funding for on-reserve housing.

(10) Overall, this bill does not provide the proper balance between collective rights and individual rights and instead reserves the real power for INAC.

IV. RECOMMENDATIONS

(1) *Bill S-4* should be withdrawn.

This will allow INAC time to conduct consultations with First Nations in a way which provides them with all relevant information, an explanation of how each section of the bill is intended to work and an assessment of how this bill could impact their communities.

At best, Canada has a legal duty to consult directly with First Nations on the potential impact of the bill and accommodate their legitimate rights and interests after having first fully informed them about the bill and its implications. At worst, Canada has a legal and moral obligation to ensure that First Nations understand the bill and know how it will impact their communities prior to proceeding with the bill.

If the bill is not withdrawn, then the following substantive amendments should be made:

(2) The bill must include a section in the preamble that specifically acknowledges First Nation jurisdiction over property and civil rights (including MRP) within their reserves and that this jurisdiction stems from their inherent right of self-government which is recognized and protected by section 35 of the *Constitution Act, 1982*.

(3) Specific reference must be made in the preamble to the inalienability of reserve lands as well as the fact that reserve lands are protected for the exclusive use and benefit of First Nations.

(4) A "for greater certainty" clause should be added which specifically clarifies that First Nations have the power to enact MRP and related laws and related dispute resolution mechanisms under relevant sections of the *Indian Act*.

In the alternative, a specific clause could be added to specifically empower First Nations in this regard.

(5) There must be a specific provision which provides that in the event of a conflict between federal, provincial or First Nations laws in this area, First Nations laws will be paramount.

(6) Sections which refer to mandatory referendum or ratification processes must be deleted and replaced with a section that allows First Nations to develop their own law-making processes.

This section might also include specific reference to the *Charter of Rights and Freedoms*, the *Constitution Act, 1982,* and First Nations customary law.

(7) There must be a non-derogation clause similar to that contained in the *CHRA* so as to specifically protect Aboriginal and treaty rights as well as rights contained in land claims and modern agreements.

(8) There must be a specific and complete exemption from the application of *Bill S-4* for those First Nations who have already developed their own laws in relation to MRP or for those who subsequently do so.

(9) Similar to the repeal of section 67 of the *CHRA*, there must be a minimum of a three-year transitional period for First Nations to provide them with a fair opportunity to review the new bill and develop their own MRP laws and dispute resolution processes.

Any First Nation that did develop their own laws in this time period would also be exempt from the application of *Bill S-4* at the end of three years.

(10) Any section of *Bill S-4* which creates a new interest in land for non-Indians should be deleted entirely.

Provisions which are temporary in nature (up to one year in total) could be included to provide for emergency situations and to provide enough time for individuals to make alternative arrangements. However, possession of reserve lands by non-Indians for a period greater than one year should be determined as per First Nation laws in this area.

(11) Any section which refers to or incorporates the use of a verification process administered by Canada, and/or a verifier appointed by Canada, should be deleted entirely.

Given Canada's shameful human rights record as it relates to First Nations, it is offensive that Canada would assume that it has the right or ability to supervise First Nations with regards to their human rights activities.

(12) A "for greater certainty" clause should be included which clarifies the fact that no provision contained in *Bill S-4* overrides or in any way alters the protections contained in section 89 of the *Indian Act* with regards to reserve lands and property.

(13) The sections relating to valuations should be amended to take into consideration the nature of the interest being valued.

For example, a woman on social assistance obtains a band-owned home to house herself and her 5 children, and later cohabits with a partner for 3 years. Upon dissolution of the relationship the valuation ought to take into account the fact that she does not own the home, she cannot sell the home, she has not made any equity or profit from the home, she cannot obtain a loan against the home and that reserve housing is worth far less than the fee simple market even if it were sellable. In this situation, I do not see how an Aboriginal woman could be ordered to pay her ex-partner for a fictional value in that home that may have no windows, running water and is full of mold and abestos.

(14) The definitions related to spouse must be amended to reflect a longer period of cohabitation than one year.

People voluntarily enter into a marriage contract and all the legal rights therein once they marry. However, some people chose not to marry because of those legal obligations. To allow relationships of one year to enjoy the benefits of constitutionally protected land rights is unreasonable and takes away that choice from those who specifically do not want to put reserve lands at risk. There must be a better balance that reflects the nature of the entitlements (possession of lands reserved for Indians) with the length of the relationship which is best determined according to First Nations laws, customs, practices and traditions.

Some of my more general recommendations include:

(15) Funding should be provided to First Nations to both participate in *Bill S-4* consultations and to enact their own MRP laws and dispute resolution mechanisms.

(16) *Bill C-3* must be amended to fully address gender inequality which is a major barrier to the descendants of Indian women being able to access reserve residency and *Bill S-4* in the first place.

(17) Canada should withdraw all bills currently in the Senate and the House unless and until such time as it has properly consulted with First Nations and those impacted.

V. SUMMARY

Bill S-4 has not been through a proper consultation process and as such, has been prematurely introduced into the Senate. The same can be said of all the bills currently before the House and the Senate dealing with Aboriginal subject matter. Additionally, these bills are being rushed through the process by having half introduced in the House and half introduced in the Senate at the same time. This creates an unfair challenge for First Nations, many of whom have significant capacity issues.

Canada recognized that the inherent right to self-government for First Nations is recognized and protected by section 35 of the *Constitution Act, 1982*. Furthermore, Canada has suggested that one of the purposes of *Bill S-4* is to recognize First Nation jurisdiction and law-making powers with regard to MRP. There is no reason why the bill cannot explicitly empower First Nations to so enact their own MRP laws.

This process has been going on for several years and while Canada did not consult with First Nations on *Bill S-4*, it did receive valuable input from Aboriginal women and political organizations on MRP generally. Canada had the benefit of the Report of the Ministerial Representative but chose to ignore some of her more significant observations and recommendations. Canada had the benefit of hearing the views of hundreds of Aboriginal women leaders and their political organizations but has ignored their views and their near unanimous opposition to this bill.

Many First Nations suffer from various capacity issues resulting from the lack of education and training, lack of clean drinking water, housing shortages, and severe lack of funding in child and family services. Despite Canada's own Auditor General pointing out INAC's significant responsibilities in these areas, Sheila Fraser noted with surprise that even after many years, INAC has not made any significant advancements. No funding has been provided by INAC to help address capacity issues in First Nations, and law-making is no exception.

Canada has once again, resorted to drafting legislation according to its own priorities and now seeks to impose that legislation on First Nations against their will. No amount of political spin will change that fact.

Has Canada really backed away from the assimilatory foundation upon which its early colonial Indian policies were built as Canada's residential schools apology would suggest?

Bill S-4 would suggest that it has not.

I respectfully request that this committee consider *Bill S-4* within this broader context and potential implications and direct Canada to withdraw the bill.

[1] Bill C-3 - *An act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs).* The short title for this bill is *Gender Equity in Indian Registration Act*. This bill was introduced in the House in March 2010 and is still in debate at the report stage.
[2] Bill C-24 - *An Act to Amend the First Nations Commercial and Industrial Development Act and another Act in consequence thereof* was introduced in the House in May 2010. Bill S-11 - *First Nations Safe Drinking Water Act* was introduced in the Senate in May 2010. The *First Nations Certainty of Land Title Act* was introduced in the House in May 2010. This bill is nearly identical to *Bill C-63* which had been introduced in December 2009. In 2008, section 67 of the *Canadian Human Rights Act* R.S., 1985, c. H-6 [*CHRA*] was repealed. This was the section which exempted activities and decisions made pursuant to the *Indian Act* from *CHRA* scrutiny. Along with the repeal of section 67, interpretive clause and non-derogation clauses were added to the *Act* to ensure Aboriginal customary law was considered in any claim and that Aboriginal and treaty rights were not affected.
[3] Bill 218 - *Ontario Tax Plan for More Jobs and Growth Act*, S.O., 2009, c.34. Bill 191 - *An Act With Respect to Land Use Planning in the Far North* was introduced in the Ontario Parliament in June 2009 and was carried over to this session.
[4] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at p.1430-32.
[5] *Indian Act*, R.S.C. 1985, c. I-5, as am. By R.S.C. 1985, c.2 (1st Supp) [*Bill C-31*].
[6] *McIvor v. Canada* [2009] 2 C.N.L.R. 236.
[7] P. Palmater, Presentation to the Standing Committee on Aboriginal Affairs and Northern Development (AAON) re *Bill C-3 - Gender Equity in Indian Registration Act* (April 20, 2010), online: <http://www.nonstatusindian.com/docs/Presentation_to_Standing_Committee.pdf>.
[8] This includes non-Indian spouses who (for most First Nations without residency by-laws) have a right to live on reserve by the invitation of their Indian or band member spouse. *Bill S-4* will create new interests in reserve lands such that this right will extend to these people even after marriage breakdown. By contrast, the descendants of Indian women who married out do not all have the right to live on reserve and are treated as though they were non-Indians. It is possible then, that a child of an Indian woman who married out could never be entitled to live on the reserve, whereas non-Indians could obtain up to life-interests in reserve lands.
[9] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at p.1430-21: "I encourage members of this committee to consider Bill S-4 in the context of initiatives that protect individual rights on reserve, provide gender equality and combat family violence."
[10] *Ibid*. at p. 1430-30.
[11] See for example: Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, v.1-5 (Ottawa: Minister of Supply and Services, 1996) [*RCAP*]. Statistics Canada, 2006 Census: Aboriginal Peoples in Canada, 2006: Findings, online: < http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/index-eng.cfm>, Statistics Canada, 2001 Census: Aboriginal Peoples in Canada, 2001: A Demographic Profile, online: <http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/pdf/96F0030XIE2001007.pdf.
[12] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203 [*Corbiere*].
[13] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at p.1430-21.
[14] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting NWAC President Jeannette Corbiere-Lavell at p.1000-6: "The proposed legislation is based on a delegated law-making authority model, which may be okay as in interim measure if it were supported by protections for Aboriginal women and also provided for recognition of inherent jurisdiction, Aboriginal rights under section 35 of the Constitution and international legal standards and rights. However, this legislation does not recognize these critical human rights issues."
[15] Six Nations of the Grand River Territory, "Ministerial Representative's Matrimonial Property Recommendations Largely Ignored by Bill S-4 [Formerly C-8 & C-47]" (Ohsweken: Six Nations, 2010) submitted as part of presentation to Standing Senate Committee on Human Rights Presentation given May 31, 2010.
[16] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting NWAC President Jeannette Corbiere-Lavell at p.1000-6: "Unfortunately, our solutions were not reflected in this piece of legislation that was drawn up... We called for a solution that would address the ongoing discrimination in the Indian Act and broader citizenship issues."

[17] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Six Nations Band Councillor, Ava Hill at p.1000-35.
[18] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Chief Louise Hillier of Caldwell First Nation at p.1000-21.
[19] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Chief Julie Phillips-Jacobs of Akwesasne at p.1000-40.
[20] Wendy Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve*, (Ottawa: Minister of Public Works and Government Services Canada, 2007) [*MRP Report*] at page 7 and Appendix L.
[21] *Ibid.* at 23.
[22] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-21.
[23] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-21.
[24] Canadian Bar Association, *Bill S-4 Family Homes on Reserves and Matrimonial Interests or Rights Act*, (Ottawa: CBA, May 2010), online: < http://www.cba.org/CBA/submissions/pdf/10-39-eng.pdf> at 13-18. CBA notes four general areas over which new interests are created by *Bill S-4*: (1) Occupation of Family Home, (2) Emergency Protection Order, (3) Exclusive Occupation Order and (4) Division of Property and Compensation.
[25] *Indian Act*, R.S.C. 1985 c. I-5 [*Indian Act*].
[26] *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Delgamuuwk* v. B.C., [1997] 3 S.C.R. 1010 [*Delgamuuwk*], *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*], *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 [*Taku*], *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [*Mikisew Cree*].
[27] *Indian Act, 1985*, ss. 2, 18, 20, 22, 24, 28, 30, 36, 37, 38, etc.
[28] *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11 at s.35.
[29] *Delgamuuwk, supra* note 24. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. Gladstone*, [1996] 2 S.C.R. 723., *R. v. N.T.C. Smokehouse*, [1996] 2 S.C.R. 672 [*Van der Peet trilogy*].
[30] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-27.
[31] *MRP Report*, *supra* note 20 at 22.
[32] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-24.
[33] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Chief Julie Phillips-Jacobs of Akwesasne at p.1000-40.
[34] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-26.
[35] *MRP Report*, *supra* note 20 at 37.
[36] *Ibid*. at 37-38.
[37] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-26: "We did not go to every reserve because there are 600 or so across Canada".
[38] *Corbiere, supra* note 12 at para.104.
[39] Canadian Bar Association, *Bill S-4 Family Homes on Reserves and Matrimonial Interests or Rights Act*, (Ottawa: CBA, May 2010), online: < http://www.cba.org/CBA/submissions/pdf/10-39-eng.pdf> at 25.
[40] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-26.
[41] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Senator Patrick Brazeau at page 1430-35.
[42] All of the Auditor General reports are available online at: < http://www.oag-bvg.gc.ca/internet/English/admin_e_41.html>. Transcripts from multiple Senate and house committees before which she has testified are also available at: < http://www.parl.gc.ca/common/index.asp>. The Aboriginal Peoples Television Network recently produced an investigative report on INAC funding in 2010 entitled "Money Woes at Indian Affairs", online: < http://www.aptn.ca/pages/investigates/ondemand.php?wmv=20100319>.
[43] *Ibid.*

[44] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Minister Strahl at page 1430-26.
[45] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Chief Jody Wilson-Raybould of the AFN at page 1000-5.
[46] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting NWAC President Jeannette Corbiere-Lavell at page 1000-6.
[47] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting AIAI Grand Chief Randall Philips at page 1000-22.
[48] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Chief William Montour of Six Nations at page 1000-35.
[49] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Mohawk Grand Chief Mike Mitchell at page 1000-40.
[50] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting AFN Regional Vice-Chief Angus Toulouse from Chiefs of Ontario at page 1000-37.
[51] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting CAP President Betty-Ann Lavallee at page 1000-16.
[52] Transcript of The Standing Senate Committee on Human Rights (Monday, May 31, 2010) quoting Deputy Chief Commissioner of the Canadian Human Rights Commission, David Langtry at page 1430-5 and 1430-12.
[53] P. Palmater, "An Empty Shell of Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 Dal. L.J. 102.

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http://www.nonstatusindian.com/docs/Presentation_to_Standing_Committee.pdf

"Opportunity or Temptation", a book review of T. Flanagan, C. Alcantara, A. Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* for the Literary Review of Canada (Toronto: Literary Review of Canada, 2010).

Beyond Blood: Rethinking Aboriginal Identity and Belonging (JSD Thesis, Dalhousie Law School 2009) [publication forthcoming].

"An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians" (2000) 23 Dal. L.J. 102.

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