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LEGISLATIVE SUMMARY

Bill S-2:
Family Homes on Reserves and Matrimonial Interests or Rights Act

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Legislative Summary of Bill S-2

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL S-2: FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT*

1 BACKGROUND

Bill S-2, 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 (short title: Family Homes on Reserves and Matrimonial Interests or Rights Act) was introduced in the Senate on 28 September 2011 by the Deputy Leader of the Government in the Senate, the Honourable Claude Carignan. **The bill was referred to the Standing Senate Committee on Human Rights on 1 November 2011, and the committee reported the bill back to the Senate with two amendments. The amended bill was passed by the Senate on 1 December 2011, and the bill subsequently received first reading in the House of Commons on 8 December 2011.**

The bill was first introduced as Bill C-47 during the 2nd Session of the 39th Parliament. Bill C-47 died on the *Order Paper* when Parliament was dissolved on 7 September 2008. It was reintroduced as Bill C-8 during the 2nd Session of the 40th Parliament, but it died on the *Order Paper* once again when Parliament was prorogued on 30 December 2009. It was introduced a third time as Bill S-4 during the 3rd Session of the 40th Parliament, and was considered by the Standing Senate Committee on Human Rights in May and June 2010. Bill S-4 was passed by the Senate on 6 July 2010, and was introduced in the House of Commons on 22 September 2010 by then Minister of Indian Affairs and Northern Development, the Honourable John Duncan. Bill S-4, however, died on the *Order Paper* when Parliament was dissolved on 26 March 2011.

Bill S-2 addresses issues relating to family real property on reserves by providing that a First Nation has the power to enact laws relating to "the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves" (clause 7(1)). The federal provisional rules in the bill will apply until a First Nation has such laws in force. The rules will apply to a First Nation under the *First Nations Land Management Act* in specific circumstances. First Nations that have the power to manage their reserve lands under a self-government agreement may opt to have the federal rules apply to them.

1.1 CONTEXT

When married couples divorce, the division of matrimonial property, both real (e.g., land and houses) and personal is determined in accordance with provincial laws, as a result of subsection 92(13) of the *Constitution Act, 1867*. However, as a result of subsection 91(24) of that Act, which specifies that the Parliament of Canada has exclusive legislative authority with respect to "Indians and Lands reserved for the Indians," provincial laws do not apply to the division of real property on reserve lands.

In *Derrickson* v. *Derrickson*,[1] the Supreme Court of Canada stated that courts cannot rely on provincial law to order the division of matrimonial real property on reserves.

The historical absence of provisions in the federal *Indian Act* or elsewhere governing the division of matrimonial real property on reserves has resulted in what is often referred to as a legislative gap. Consequently, people residing on reserves have not been able to use the Canadian legal system to resolve matters concerning the division of real property after the breakdown of conjugal relationships.[2]

Numerous domestic and international reports have referred to the matter, including reports from the United Nations.[3] All have recommended that Canada take steps to resolve the issue.

1.2 Parliamentary Review of the Issue

The matrimonial real property on reserves issue has been examined by several parliamentary committees.

In its November 2003 interim report, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*,[4] the Standing Senate Committee on Human Rights' recommendations focused on amending the *Indian Act* to allow for the application of provincial and territorial matrimonial property laws on reserves. That committee's recommendations highlighted the need for those amendments to, among other things: (1) recognize First Nations measures already in place that address the issue; (2) take into account the rights of children; and (3) recognize rights of occupancy in certain circumstances.

The House of Commons Standing Committee on Aboriginal Affairs and Northern Development reported on the issue in June 2005. In its report, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*,[5] that committee echoed the Standing Senate Committee's view that legislative change was needed, recommending the immediate drafting of either interim stand-alone legislation or amendments to the *Indian Act* to make provincial/territorial matrimonial property laws apply to real property on reserves. That committee noted that such legislation should, among other things: (1) recognize First Nations' inherent jurisdiction with respect to matrimonial real property; (2) authorize First Nations to enact their own matrimonial real property regimes; and (3) contain a non-derogation clause.

Finally, the House of Commons Standing Committee on the Status of Women reviewed the issue in May 2006.[6] To move the issue forward, that committee recommended that a high-level committee be established to develop a range of solutions, including legislative ones, to be used in national consultations on the issue.

1.3 The Federal Initiative

1.3.1 Consultations

On 20 June 2006, the Honourable Jim Prentice, then Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, announced that nation-wide consultations would be held on the issue of matrimonial

real property (MR) on reserves, and that Wendy Grant-John had been appointed as his ministerial representative to assist with the consultation process.[7] The objectives of the ministerial representative's mandate were as follows:

> 1. To ensure appropriate consultations on the issue of MRP, including conformity to *Haida* case law principles[8] and concerns with the consultation process and how best to facilitate a process that includes the AFN [Assembly of First Nations], NWAC [Native Women's Association of Canada] and INAC [Indian and Northern Affairs Canada].
>
> 2. To identify the best viable legislative solution to ensure that:
>   - First Nations women's rights are considered and the Canadian Charter of Rights and Freedoms and human rights are respected;
>   - There is harmonization with provincial/territorial legislation (as required);
>   - There is an acceptable balance between individual equality rights guaranteed by ss. 15 and 28 of the Charter and collective rights recognized in s. 35 of the *Constitution Act, 1982* and referenced in s. 25 of the Charter.[9]

The consultation process consisted of a planning phase (June 2006), a consultation phase (September 2006 to January 2007), and a consensus-building phase (February 2007). As the ministerial representative described in her report, "the ultimate goal of the three-phased process was to explore the potential for jointly developing legislative and non-legislative options to address matrimonial real property issues on reserves."[10]

During the planning phase, the ministerial representative "worked with the AFN, NWAC and INAC to develop guidelines for discussion between the three organizations about their perspectives and concerns regarding matrimonial real property issues on reserves."[11]

During the actual consultation phase, INAC put forward the following three options for consideration:

> 1. Incorporation of provincial/territorial matrimonial real property laws on reserves through amendments to the *Indian Act* or stand-alone federal legislation;
>
> 2. Option 1 (above), combined with the recognition of a First Nation jurisdiction with regard to matrimonial real property; and
>
> 3. Substantive federal matrimonial real property law combined with the recognition of a First Nation jurisdiction with regard to matrimonial real property.[12]

The NWAC facilitated discussions with Aboriginal women on and off reserves while the AFN discussed the issue during eight regional sessions. Both organizations used other means, including an online survey and a toll-free line to enable participation. INAC consulted with provinces and territories as well as "other interested organizations and communities not represented by either the AFN or NWAC."[13]

According to INAC, the national consultation process was comprehensive.[14]

1.3.2 The Report of the Ministerial Representative

1.3.2.1 General Observations and Conclusions

In her report, the ministerial representative noted that while there had not been sufficient time to reach consensus, "progress was made towards shaping a consensus through substantive discussions of many important policy issues and concerns."[15] However, she stressed that concerns about the consultation process were central to many of the discussions held, including whether there was a duty to consult, and whether that duty had been discharged.

Noting that the federal government has yet to develop a consultation policy to be used in situations such as this, the ministerial representative recommended that "efforts be made to address this large gap in federal policy as soon as possible … includ[ing] developing a companion set of practices and procedures for monitoring, recording and assessing concerns about consultations made by First Nation representatives throughout the process."[16]

Other concerns raised during the consultations related to the need for and/or usefulness of a legislative response to the issue. Such concerns included the difficulty in accessing courts (particularly family courts), the difficulty in enforcing court orders on reserves, the severe housing shortage on reserves, and the need for resources to implement any proposed solution.

With respect to the three options proposed by INAC, the ministerial representative noted that participants overwhelmingly rejected any application of provincial laws, which negated options 1 and 2.[17] With respect to Option 3, she noted that it was not clear whether recognizing First Nations' inherent jurisdiction, as opposed to delegating federal authority, was a possibility, but that "delegated powers would not be acceptable and First Nations are looking for a clear recognition of First Nations' jurisdiction."[18]

The ministerial representative also emphasized the need for the matrimonial real property project "to be part of the larger ongoing process of reconciliation."[19]

1.3.2.2 The Proposed Legislative Framework

The ministerial representative proposed establishing new stand-alone legislation, which would require consequential amendments to other acts. This legislation would be in two parts: Part 1 would recognize First Nations' jurisdiction over the issue, and Part 2 would establish interim federal rules that apply until such time as a First Nation has exercised its jurisdiction and adopted its own laws.

Key components of the ministerial representative's proposed legislative framework include the following:

- a Preamble, which would set out key principles, such as the need to be consistent with fundamental human rights principles, the need to provide immediate interim federal measures, the need to recognize First Nation jurisdiction over the issue, and the priority interests of children;[20]

- defining to whom the Act applies (First Nations under FNLMA to be excluded, couples married under custom or provincial law and common-law partners to be included);[21]
- providing for a review of the Act and its implementation;[22]
- protecting married spouses from having the matrimonial home sold without their knowledge or consent;[23]
- allowing for the temporary exclusive possession of the matrimonial home in urgent and other situations;[24]
- authorizing courts of competent jurisdiction to grant applications for compensation orders relating to the value of the matrimonial home;[25] and
- authorizing courts to develop new interim remedies that may better reflect First Nations diversity and legal traditions.[26]

2 DESCRIPTION AND ANALYSIS

Bill S-2 contains a preamble and 56 clauses. The following section provides a summary overview of selected clauses contained in the bill.

2.1 PREAMBLE

The preamble notes the necessity of addressing certain family law matters on reserve, and highlights the need for decision-makers to consider, among other things, the best interests of the child, including the interest of any child who is a First Nation member to maintain a connection with that First Nation. It also notes the role of First Nations in informing judicial decision-makers of the cultural, social and legal context of a case.

2.2 DEFINITIONS

A number of terms have particular significance in the context of the bill. “Court,” unless otherwise indicated, means:

> (*a*) for the Province of Ontario, the Superior Court of Justice,
>
> (*a.1*) for the Province of Prince Edward Island or Newfoundland, the trial division of the Supreme Court of the Province,
>
> (*b*) for the Province of Quebec, the Superior Court,
>
> (*c*) for the Provinces of Nova Scotia and British Columbia, the Supreme Court of the Province,
>
> (*d*) for the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Queen’s Bench for the Province, and
>
> (*e*) for Yukon or the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice.[27]

A “designated judge” refers to a justice of the peace appointed by the lieutenant governor in council of the province, a judge of the court in the province or a judge of a court established under the laws of the province. “Family home” means a structure situated on reserve land (but not necessarily affixed to land) where spouses or common-law partners either habitually reside or, if they have ceased to cohabit or one of them has died, where they had habitually resided.

The bill distinguishes between categories of property rights. Under the bill, “interest or right” means interests in or to reserve land pursuant to the *Indian Act* and other specified instruments, as well as interests in or to a structure on reserve land that are recognized by the First Nation or by court order. “Matrimonial interest or rights” means interests – excluding those in the family home – held by one or both conjugal partners that were acquired during, in contemplation of, or that appreciated in value during, the conjugal relationship.

2.3 Purpose and Application (Clauses 4–6)

Clause 4 establishes the purpose of the bill as “providing for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner.” The laws or provisional rules address the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by the spouses or common-law partners in or to structures and lands on reserves in the aforementioned circumstances.

Clause 5 confirms that the bill does not affect title to reserve lands, and that reserve lands continue to be (1) set apart for the use and benefit of the First Nation and (2) lands reserved for the Indians within the meaning of section 91(24) of the *Constitution Act, 1867*.

Clause 6 states that the bill applies only where at least one of the spouses or common-law partners is a First Nation member or an Indian.

2.4 Enactment of First Nation Laws (Clauses 7–11)

Clauses 7 to 11 describe the process involved in establishing First Nation laws relating to “the use, occupation and possession of family homes on [First Nations] reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves” (clause 7(1)). The proposed laws must be submitted to the members of the First Nation for approval, and are approved if (1) at least 25% of eligible voters participated in the vote (clause 9(2)), and (2) a majority of those who participated in the vote approved the laws (clause 9(1)). A First Nation council may increase the percentage of eligible voters required to participate in the vote (clause 9(3)).

Previous versions of the bill had required that, for a First Nation law to be approved, the following conditions had to exist:

- **a majority of eligible voters had to participate in the vote;**

- **a majority of those who participated had to approve the laws; and**
- **more than 25% of eligible voters had to approve the laws.**

Following approval of the First Nation laws, the council must inform the Minister of the results and send a copy of the laws to the Minister, to any organization designated by the Minister, and to the Attorney General of any province in which a reserve of the First Nation is situated (clause 10). Unless otherwise specified, the laws come into force on the day that they are approved (clause 11(1)).

Previous versions of the bill had required that a First Nation and an organization designated by the Minister jointly appoint a verification officer who, among other things, was to determine whether the proposed community approval process was in accordance with the bill. Those provisions do not appear in Bill S-2.

2.5 Provisional Federal Rules (Clauses 12–52)

Clause 12 clarifies that the provisional federal rules apply only to a First Nation that has reserve lands and that has not enacted its own laws under clause 7. In addition, the provisional federal rules will not apply to First Nations that are on the Schedule to the *First Nations Land Management Act* until three years from the coming into force of clause 55. The rules will then apply if (1) the land code adopted by the First Nation in accordance with the *First Nations Land Management Act* is not in force (clause 12(2)(*a*)), and (2) the First Nations laws enacted under clause 7 or rules and procedures established under section 17 of the *First Nations Land Management Act* (Rules on Breakdown of Marriage) are not in force (clause 12(2)(*b*)). The provisional rules will apply to First Nations that have the power to manage their reserve lands under a self-government agreement only if (1) they opt to have the federal rules apply to them (clause 12(3)(*a*)), and (2) the First Nation laws enacted under clause 7 or under a self-government agreement are not in force (clause 12(3)(*b*)).

2.5.1 Family Home (Clauses 13–27)

Clauses 13 to 27 relate to the occupation of the family home. They provide spouses or common-law partners, whether or not they are First Nation members or Indians, with rights of occupancy during the conjugal relationship (clause 13) and, in the event that a spouse or common-law partner dies, for a period of 180 days after the day on which the death occurs (clause 14). In situations of family violence, emergency protection orders can be obtained from a designated judge of the province in which the family home is situated; such orders can **grant**, among other things, **the exclusive occupation of the family home to the person who applied for it, for up to 90 days (clauses 16 to 19). Clause 17(8) originally stated that on a rehearing, the court could only extend the duration of the emergency protection order by an additional 90 days. That clause was amended by the Standing Senate Committee on Human Rights to instead state that the court "may extend the duration of the order beyond the period of 90 days referred to [in clause 16]."**

Individuals can also apply for a court order awarding exclusive occupation of the family home **on a non-urgent basis** for a prescribed period, whether or not they are First Nation members or Indians (clause 20, and in the case of survivor spouses or common-law partners, clause 21). In the latter case, the court is required to consider a number of matters, including the collective interests of First Nation members in their reserve lands and representations by the First Nations council. Interests or rights held in or to the family home are not affected by emergency protection orders, exclusive occupation orders or exclusive occupation orders made after the death of a spouse or common-law partner (clause 23).

2.5.2 Division of the Value of Matrimonial Interests or Rights (Clauses 28–40)

Clauses 28 to 40 establish the regime for the division of matrimonial interests or rights on the breakdown of the conjugal relationship (clauses 28 to 33) and on the death of a spouse or common-law partner (clauses 34 to 40). In both situations, the calculation of the entitlement amount depends on whether or not a spouse or common-law partner is a member of the First Nation on whose reserve the property is situated (clauses 28(2) and 28(3); clauses 34(2) and 34(3)). The calculation of the division of matrimonial rights or interests on the breakdown of the relationship or on the death of a spouse or common-law partner is not set in stone, as a person can apply to a court for a variation of the distribution on the grounds that the legislated distribution is unconscionable in their particular set of circumstances (clause 29; clause 35). In addition to applying for a variation of the distribution amount, a spouse or common-law partner can apply for a court order determining the amount payable by one spouse or common-law partner to the other, and determining how the amount payable is to be settled (clause 30). A court can also, on application by a spouse or common-law partner, make any order necessary to restrain the improvident depletion of an interest or right (clause 32).

In the case of an applicant spouse or common-law partner who is a First Nation member, a court can also order that certain interests or rights to land or structures be transferred to them (clause 31).

2.5.3 Notice to Council [of a First Nation] and Views of Council (Clauses 41 and 42)

With the exception of applications for emergency protection orders and applications for orders relating to confidentiality, courts are required to allow the council of a First Nation on whose reserve the affected lands and structures are located “to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made” (clause 41(2), clause 18(3) and paragraph 21(3)(*d*)).

2.6 Jurisdiction of Courts (Clauses 43–46), Rules of Practice and Procedure (Clause 47), Other Provisions (Clauses 48–52), Regulations (Clause 53), Transitional Provisions (Clauses 54 and 55) and Coming Into Force (Clause 56)

For the most part, clauses 43 to 56 relate to procedural, administrative and logistical aspects of the bill. Clauses 43 and 44 determine which courts have jurisdiction in particular circumstances, while clause 47 articulates the rules that can be made respecting proceedings under the bill.

Clause 48 provides that, for the purposes of the bill, a court may, on application, determine whether a spouse, common-law partner, a survivor or an estate of a deceased spouse or common-law partner holds interests or rights in or to a structure or land situated on a reserve.

Clause 52 relates to the enforcement of orders relating to the amounts payable following the breakdown of a conjugal relationship (clause 30(1)) or the death of a spouse or common-law partner (clause 36(1)). A person who is neither a First Nation member nor an Indian can apply to have the order enforced by the council of a First Nation as if the order had been made in favour of the First Nation (clause 52(1)). However, the council is not bound to enforce the order, and if the council issues notice that it will not enforce the order, or does not enforce it within a reasonable period, a court may, where necessary, allow an application to vary the order to require the person against whom the order was made to pay into court the amount payable (clause 52(2)).

Clause 53 grants the Governor in Council broad discretion to make any regulations it considers necessary for carrying out the purposes and provisions of the bill.

Clause 54(1) establishes that where the provisional federal rules begin to apply to a First Nation, certain provisions also begin to apply to spouses and common-law partners (clause 54(1)(*a*)) and to survivors (clause 54(1)(*b*)) with respect to structures and lands on the reserve of that First Nation. When a First Nation is no longer subject to the provisional rules, clause 54(2) establishes what provisions and proceedings continue to apply in what circumstances.

Clause 55 provides that the provisional federal rules do not apply to a First Nation that is subject to the *First Nations Land Management Act* and that has neither a land code nor conjugal real property laws in force, until three years after the provision comes into force.

Finally, with the exception of clauses 12 to 52 and the transitional provisions, the bill comes into force on a day or days to be fixed by order of the Governor in Council (clause 56(1)). Clauses 12 to 52 come into force one year after the day on which clause 7 (power to enact certain First Nation laws) comes into force. **Previous versions of the bill had not included this one-year transitional period between the time when First Nations are authorized to enact laws and the time when the provisional federal rules apply to the First Nations without rules in place.**

3 COMMENTARY

Like reaction to its predecessors, reaction to Bill S-2 has been **primarily** negative. Individuals and organizations who have commented on the new bill have emphasized that for the most part, key issues that had been raised with respect to previous incarnations of the bill **(e.g., inadequate consultation, a failure to recognize First Nations' inherent jurisdiction over the issue, and the need to improve access to justice)** have not been addressed.

Some witnesses that appeared before the Standing Senate Committee on Human Rights in November 2011 acknowledged that removing the verification officer provisions, changing the voting threshold, and adding a one-year transitional period between when First Nations are authorized to enact laws and when the provisional federal rules apply were positive differences between Bill S-2 and its predecessors.

When Bill S-2's predecessor, Bill S-4, was considered by the Standing Senate Committee on Human Rights **in May and June 2010**, witnesses highlighted the following issues:

- shortcomings in the consultation process prior to the drafting of the bill;
- the requirement to recognize First Nations' inherent right to self government and their jurisdiction over matrimonial interests;
- difficulties accessing the legal system;
- access to alternative dispute resolution mechanisms;
- the need for a comprehensive solution to address underlying issues (family violence, chronic housing shortages, poverty, the lack of shelters and temporary accommodations); and
- a commitment to take non-legislative action (e.g., creation of a legal aid fund).

Lastly, most witnesses were extremely critical of the provisions in the bill regarding a community approval process. **Under Bill S-4,** the process required **oversight** by a designated verification officer and involved a minimum participation threshold that conflicted with the tradition of consensus-based decision making. As mentioned earlier, the provisions relating to the verification officer do not appear in Bill S-2, and the approval process no longer requires that a majority of eligible voters participate in a vote.

For the most part, First Nations communities and Aboriginal organizations spoke out against Bill S-4's predecessor, Bill C-8. On 14 May 2009, the Native Women's Association of Canada (NWAC) and the Assembly of First Nations (AFN) issued a joint press release stating their opposition to the bill, noting that:

> NWAC and the AFN (including the AFN Women's Council), all agree that Bill C-8 will do nothing to solve the problems associated with Matrimonial Real Property (MRP) on-reserve; that the federal government failed in its duty to consult and accommodate the views of First Nations; and, as a result, the Bill is fatally flawed and cannot be fixed. It should not proceed to committee.[28]

The news release also states that:

- the recommendations of the Ministerial Representative were ignored;
- the bill "is a one-dimensional approach to a complex problem that does not address the real issues in communities";
- families in remote communities will have to endure long waiting periods before their cases can be heard;
- "Bill C-8 will put women who are experiencing family violence at further risk by forcing them to wait long periods for justice without adequate social supports, services or shelters";
- "the legislation attempts to pit the individual rights of women against the collective rights of First Nations people"; and finally,
- "[t]he resolution of MRP matters requires collaborative efforts between the federal government and First Nations. Solutions must address the root causes of the poor socio-economic conditions faced by First Nations couples that contribute to MRP issues."

Second reading debate on Bill C-8 focused on many of the issues raised by NWAC and the AFN, and Todd Russell, MP, moved that the motion to read the bill a second time and refer it to a committee be amended so that the bill would instead be read "six months hence," which would "give the government the time it needs to work cooperatively with First Nations on the complicated issue of matrimonial real property."[29] The amendment was rejected on 25 May 2009, with 120 members of Parliament voting for the amendment and 125 members voting against the amendment. The bill was not debated any further prior to prorogation on 30 December 2009.

Reaction by Aboriginal organizations to Bill C-8's predecessor, Bill C-47, was mixed. The NWAC stated that it did not support the bill, and that "[t]he Government of Canada has acted unilaterally in trying to resolve the issue." According to NWAC, "nonlegislative solutions are necessary to make the rights in the legislation real for communities."[30]

Quebec Native Women Inc., while supporting the idea of legislation in principle, expressed the concern that C-47 did not address the housing shortage on reserves, and requested that meaningful consultation occur before the legislation was passed. The organization cautioned "against PanAboriginal legislation since the over 600 Aboriginal communities in Canada contain a diverse cross section of traditional and cultural realities and an all-encompassing legislation cannot meet the specific needs of each Nation or community."[31]

The AFN Women's Council raised the same issues in response to Bill C-47 as it did in the May 2009 joint NWAC-AFN news release, noting that "[w]hat they've drafted is very much a made-in-Ottawa Bill."[32]

At least one Aboriginal organization expressed support for Bill C-47. The Congress of Aboriginal Peoples noted that the legislation "represents a progressive step towards offering First Nations families means of escaping the paternalistic, prescriptive provisions of the Victorian-era *Indian Act*."[33]

Most media commentary supported the introduction of Bill C-47, albeit acknowledging in some instances that the issues were complicated and that getting the legislation passed might have been difficult.

NOTES

* Anna Gay, formerly of the Library of Parliament, contributed to the preparation of this paper.

1. *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285.

2. More recently, some First Nations have established, or have attempted to establish, matrimonial real property regimes. For example, First Nations that are governed by the *First Nations Land Management Act*, S.C. 1999, c. 24, must establish matrimonial real property laws. Other First Nations have included provisions in their housing policies or created by-laws that address the issue, but these by-laws were disallowed by the Department of Indian Affairs and Northern Development on the basis that they exceeded the by-law authority set out in the *Indian Act*.

3. As of 9 February 2009, the most recent United Nations reference to the issue is found in "Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada," United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), 42nd Session, C/CAN/CO/7, 7 November 2008. The Committee "urge[d] the state party to ensure the speedy passage through Parliament and entry into force of legislation addressing the discriminatory provisions of the matrimonial property rights of aboriginal women living on reserves."

4. Senate, Standing Committee on Human Rights, *A Hard Bed to Lie In: Matrimonial Real Property on Reserve*, Interim Report, November 2003.

5. House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*, Fifth Report, June 2005.

6. House of Commons, Standing Committee on the Status of Women, Seventh Report (on matrimonial real property on reserves), 1st Session, 39th Parliament.

7. Aboriginal Affairs and Northern Development Canada [AANDC], "Minister Prentice Announces Consultations Process for Aboriginal Women," News release, 20 June 2006.

8. Wendy Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserves*, Appendix A: "Mandate of Ministerial Representative: Matrimonial Real Property on Reserves," 9 March 2007 (note no. 1 in the appendix).

> The following principles developed from Haida are to help guide consultations, to ensure that the Government of Canada engages in effective and efficient consultations with Aboriginal peoples:
>
> - Reconciliation: Consultation with Aboriginal peoples, guided by the overarching principle of reconciliation, will be grounded in the honour of the Crown, the renewal of the relationship between the Crown and Aboriginal peoples and the balancing of Aboriginal and non-Aboriginal interests.
> - Shared Commitment: Consultation will be based on a commitment to cultivate a climate of good faith, mutual respect, reciprocal responsibility, and efficiency.
> - Sound Decision Making: The consultation process will ensure that the results of meaningful consultation are sustainable.

- Transparency: Effective and efficient consultations must be timely, accessible, inclusive of all potential stakeholders, and be based on clear, open, two-way communication, and accountability.

9. Ibid.
10. Ibid., para. 2.
11. AANDC, "Consultations on the division of matrimonial real property on reserves."
12. AANDC, *Family Homes on Reserves and Matrimonial Interests or Rights Act*, "Consultation Process."
13. AANDC, "Consultations on the division of matrimonial real property on reserves."
14. AANDC, "Frequently Asked Questions – Family Homes on Reserves and Matrimonial Interests or Rights Act."
15. Grant-John (2007), para. 205.
16. Ibid., para. 184.
17. Ibid., para. 154.
18. Ibid., para. 156.
19. Ibid., para. 285.
20. Ibid., para. 237.
21. Ibid., para. 239.
22. Ibid., para. 242.
23. Ibid., para. 248.
24. Ibid., para. 249.
25. Ibid., para. 251.
26. Ibid., para. 263.
27. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supplement), ss. 2(1).
28. Native Women's Association of Canada and the Assembly of First Nations, "NWAC, AFN, and AFN Women's Council Unite to Oppose Bill C8 on Matrimonial Real Property," News release, Ottawa, 14 May 2009.
29. House of Commons, *Debates*, 2nd Session, 40th Parliament, 14 May 2009, 1155.
30. Native Women's Association of Canada, "'Consultative Partnership' a Sham," News release, Winnipeg, 4 March 2008.
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