

Analysis of Bill C-47: "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."

This new 'Marital Property' Legislation specific to First Nations was introduced into Parliament for First Reading on **March 4th, 2008**.

It is a lengthy piece of legislation and deals with a host of situations which even provincial Marital Property Legislation rarely addresses.

*** This Legislation (if passed as introduced) will have a significant impact on First Nations; ie. As much, or more, of an impact as Bill C-31's Indian Act amendments.**

It will be **costly** in its implementation and **unprecedented** in its effect (some would say interference) in First Nation Affairs.

At this time, it is best to simply highlight the most controversial aspects of the Legislation. It is assumed that some changes will be made as the **Bill** makes its way through Parliament, but it would require a radical 'makeover' for this Legislation to be acceptable to First Nations.

A Brief Overview

The Official '**Summary**' of the Bill indicates that,

This enactment provides for the adoption 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, respecting 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 spouses or common-law partners in or to structures and lands on those reserves.

- The **Bill** (once it is enacted) would be officially called the **Family Homes On Reserves and Matrimonial Interests or Rights Act**.
- The **Bill** is centred around the concept (and definition) of the "**family home**": It can mean anything from a traditional house to a trailer, provided spouses or "common law partners" habitually reside there.

The **Bill** chiefly attempts to deal with "**interest(s)**" or "**right(s)**" in the "family home".

*** An "interest" or "right" is defined as including,**

- (i) a **right to possession, with or without a Certificate of Possession or a Certificate of Occupation, allotted in accordance with section 20 of the [Indian] Act.**
- (ii) a **permit referred to in subsection 28 (2) of that Act, and**
- (iii) a **lease under section 53 or 58 of that Act.**

In other words, the new legislation will deal with an interest or right in a family home either allotted by the First Nation's Council, or "recognized" by the First Nation or for

which a "C.P" has been given or for which a lease has been granted.

**** This definition alone creates unprecedented non-Indian Legislative and Judicial interference** in the existing right and ability of First Nations Governments to control their Housing stock and the use of Reserve lands.

There is also a **separate definition** for "matrimonial interests or rights" **separate and apart from rights in the family home** as being "...held by at least one of the spouses or common law partners" **acquired**

"...during the conjugal relationship..."

"...before the conjugal relationship but in specific contemplation of the relationship..."

"...before the conjugal relationship but not in specific contemplation of the relationship and that appreciated [ie. increased in value] during the relationship."

"Conjugal" generally means "...of or belonging to marriage or the married state..."
[but the term is **not** defined in the **Bill**].

These definitions impact the way in which the new legislation may be applied.

"[M]atrimonial interests or rights" also apply in certain circumstances not merely in respect of **current** spouses or common law partners but **former** spouses and common law partners as well [section 2(3) of the **Bill**].

- The **Bill** proclaims that its **Purpose** is to

...provide 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, respecting 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 spouses or common-law partners in or to structures and lands on those reserves. [Section 3 of the **Bill**].

- While the **Bill** champions the enactment of First Nation laws, the requirements for such enactments are **stringent**, the potential drafting and implementation costs **enormous** and the impacts maybe **limited**.
- While Reserve land title and land 'status' are protected by Section 5 of the **Bill**, the **practical effect of its provisions** are to seriously undermine that title and the status of lands as being lands reserved for Indians.
- The **Bill** indicates in **Section 6**:

...This Act applies to spouses or common law partners only if at least one of them is a First Nation member or an Indian.

Thus, the **Bill** should ordinarily have no application to two **non-Indians** living in a relationship, On Reserve; yet, the **Bill** is not entirely free of that implication: For instance, there is nothing to stop a non-Indian spouse in exclusive possession of a home On

Reserve from moving in a new, non-Indian partner.

- The **Bill** is clear that,

A First Nation has the power to enact First Nation laws that apply during a conjugal relationship...[Section 7(1) of the **Bill**].

=However=

An enacting First Nation **must**

- 1) make provision for **administering** the new law (an obvious **cost**);and
- 2) "...despite subsection 89(1) if the *Indian Act*..." Provide for the **enforcement of Court Orders** made under that law.
[Section 7(2) of the **Bill**].

Subsection 89(1) is the well known provision protecting the property of an Indian or Band On Reserve from seizure, attachment, etc. by a non-Indian.

The new **Bill** aims to **eliminate** that protection in Matrimonial Property situations.

- In a foreshadowing of other provisions in the **Bill**, Section 7(3) indicates that,

When a First Nation intends to enact laws, the council shall so notify the Attorney General of any province in which a reserve of the First Nation is situated.

This provision heralds **new costs to be assumed by the Provinces** and a **more vigorous** role of the Province and its Courts in First Nation affairs.

- The **Bill** requires that any First Nation Matrimonial Property laws be "**verified**". For this purpose, Canada plans to involve **designated "organization(s)"** in the certification process. This is a relatively new concept in legislation aimed at First Nations, with organizations taking a **direct role** in local First Nation affairs.
- The term "organization" is not clearly defined in the **Bill** but it can be assumed that various existing First Nation national, regional or provincial organizations will be designated as "verifiers". First Nations and the designated organization are required to jointly appoint a "verification officer" [Section 9(1) of the **Bill**].
- The **Verification Officer** plays an important role ensuring that a **Community Approval Process** for the new law **conforms with the Act** [ie. **Bill**] and, in essence, the Officer serves as a kind of 'electoral officer' for a **Referendum** on the First Nation's Matrimonial Property Law. [Sections 9 thru 12 of the **Bill**].
- In most cases, A **First Nations Matrimonial Property Law** is approved if a 'double majority' of First Nations eligible voters approve it, **provided** "...more that 25 per cent of the eligible voters voted..." to approve [Section 13 of the **Bill**].
- The Verification Officer must "**certify**" the fairness and regularity of the **Community Approval Process**:

Once the certification is issued, the laws are deemed to have been validly approved by the First Nation. [Section 15 of the **Bill**]

**** In combination with moves by Canada to eliminate Canadian Human Rights Act**

'immunity' for First Nations, Parliament is moving in a direction whereby First Nations laws under the new **Bill** will be open to challenge in the Courts if they do not provide for many of the contingencies set out in the **Bill**. However, it may be possible for First Nations willing to assume the effort, costs and risks of developing their own legislation to try and insulate themselves under their own laws from the worst impacts of the new **Bill**. Definitions set out in the new **Bill** would seemingly apply to any First Nations law enacted under the **Bill**.

- Once "certified", a **First Nations Matrimonial Property Law** takes effect and must be available for further public inspection. Interestingly, it appears that while a First Nations Council must submit its **original** law for Public approval, the law could provide that a Resolution of Council would be sufficient to later **amend or repeal** the law. Initial certifications and later amendments and repeals must all be made known to the **INAC Minister**, the "**organization**" overseeing verifications, and the **Attorney General** of the relevant province. [Section 16 of the **Bill**].
- No doubt, many First Nations Councils will not have the human or financial resources, and, may not wish to assume the 'political' risks of wading into the field of Matrimonial Property Law on their own. Thus, many will (at least initially and for some time thereafter) fall under what Canada calls its "**Provisional Federal Rules**" (PFR's). These **Rules** apply to all First Nations who do not pass Matrimonial Property Laws of their own.
- These new **PFR's** represent a radical change in the manner in which Marital Property and other issues are dealt with On Reserve. The 'old' **Indian Act** implications that Male or Female persons who received Council **housing allotments**, or who held **Certificates of Possession**, would be protected in their possession would now give way under the new **Provisional Rules** to a different set of priorities and procedures.
- Under the new **PFR's** it is affirmed that,

Each spouse or common-law partner may occupy the family home during the conjugal relationship, **whether or not that person is a First Nation member or an Indian**. [Section 18 of the **Bill**].

* Thus, for the first time, non-Indian occupation of Reserve land, absent a Permit, Lease or Land Surrender, is to be sanctioned by Federal Legislation.

- The non-Indian spouse or common-law partner may occupy a "family home" On Reserve for a period of **180 days** after the Indian spouse/partner dies [Section 19 of the **Bill**].
- "Subject to the Indian Act" no spouse or partner [ie. "Indian" spouse or partner] shall dispose of their interest in the family home **without the consent of the other spouse or partner**. If they do, a **Court** may set aside the transaction and impose new conditions on the spouses/partners in respect of the property. [Section 20(1) of the **Bill**].

The **Bill** even gives the non-Indian spouse or partner the right to claim **damages** against their Indian spouse for any unlawful disposition of property. [Section 20(4) of the **Bill**].

[Question: What about the effect of Section 89 of the **Indian Act**? Does this provision 'override' it?]

*This provision allows, for the first time, for a non-Indian to derive an economic advantage from a disposition of Reserve land by an Indian that has taken place outside

of the Permit/Lease/Surrender section of the **Indian Act** (except for a few minor **Indian Act** provisions relating to timber, etc.)

- The **bill** goes further than most Provincial **Matrimonial Property Legislation** in that much of its focus is on **Domestic Violence** and possession of Reserve land when Domestic Violence occurs.

The **Bill** provides for so-called “**Emergency Protection Order(s)**” whereby a Judge, on application by a spouse or partner, may make an order in circumstances of “family violence”, risk of physical harm or risk of property damage.

Any individual - including, specifically, a **peace officer** - can make the application for an **Emergency Protection Order** on behalf of a spouse or partner (i) with their consent or (ii) without their consent, but with permission of a Judge.

The **Order**, among other things can:

- grant the applicant exclusive possession of the family home;
- force the other spouse or partner to vacate the home and/or stay away from the home;
- direct a Peace Officer to assist with implementation of the Order;

for a period of up to **90 days**.

[Section 21 of the **Bill**]

- The term ‘family violence’ is very broadly defined in the **Bill**; ie. force; reckless acts causing damage to property; threats; harassment, etc. [Section 21(9) of the **Bill**].
- While there is a process for the Court to review and rehear the Emergency Order of a Judge, initially such **Orders** can be made on the basis of the Applicants evidence alone. [ie. “ex parte”]
- The Courts are also given the power under the **PFR’s** to issue **Exclusive Occupation Order(s)** [Section 25 of the **Bill**]. These non-emergency orders are in effect “...for the period that the court specifies...” and can, on an ‘interim’ or other basis, put an applicant in exclusive possession of the “family home”. The prohibitions against the other spouse or partner are not only similar to those that may be included in ‘emergency orders’ but may also include
 - 1) provision that the spouse or partner of the applicant preserve the condition of the home until they leave;
 - 2) provision that the applicant make payments to the other spouse/partner so they can secure alternate accommodations;
 - 3) provision requiring either spouse to pay directly or indirectly for all or part of the upkeep of the family home.

[Section 25(4) of the **Bill**].

- For the most part, an **Exclusive Occupation Order** replaces an **Emergency Protection Order**.
- Following the **Death** of a spouse or partner, the survivor may apply to a Court for an

Order granting them **exclusive possession of the family home** "...for the period that the court specifies...".

[This remedy is in **addition** to the 180 day protection available under Section 19 - see: Section 26 of the **Bill**].

It appears that this Order can be made even in spite of the "...the terms of the will..." of the Deceased and may require the Executor of the Will or Administrator of the Estate

"...to pay for all or part of the repair and maintenance of the family home and of other liabilities arising in respect of it."

[Sections 26(3) and (4) of the **Bill**].

- In general, a person who violates an Order of the Court issued on an Emergency basis, for Exclusive Possession on upon the Death of a Spouse or Partner may be charged with, and found guilty of, a **Summary Conviction Offence** with heavy fine consequences and jail terms possible.
- The **PFR's** also provide for the division of marital property by Court Order on the "Breakdown of a Conjugal Relationship" equal to
 - (i) 50% of the other spouse's or partner's interest in the **family home**; and **generally speaking**,
 - (ii) 50% of any other interest in lands or structures held by the other spouse/partner On Reserve **if** that spouse or partner is a member of the First Nation or a non-member but still an Indian person.

However, a Court can vary the amount "...owed to or by the applicant....if that amount would be unconscionable...." [Sections 33 and 34 of the **Bill**].

- A Spouse or Common-law Partner has up to **3years** [even longer by Court Order] to seek the type of division of Marital Property referred to above. [Section 35 of the **Bill**].
- A Court can, by Order, restrain the depletion of an interest or right in the family home, or in other Matrimonial interests or rights, that might serve as the basis of a payment to, or be transferred to, an applicant spouse or partner under the **Bill**. [Section 37 of the **Bill**].
- The **Bill** makes provision similar to those respecting remedies in the event of the breakdown of a conjugal relationship involving situations where there is a **Death** of a Spouse/Partner. [Sections 39-40 of the **Bill**]; However a survivor must make the type of application involved with the division of rights and interests "...within 10 months..." of the death of the other spouse/partner. This period, too, can be extended by Court Order. [Section 41 of the **Bill**]. Likewise, provision is made for the Courts to restrain the depletion of interests and rights belonging to a deceased. [Section 44 of the **Bill**].

In a 'nut-shell' the foregoing represents the essence of the new **Bill**.

It is a disturbing piece of legislation.

It has huge implication in terms of costs, complexities and overall implementation for First Nations and the Province.

The PFR's are especially troubling because of their breadth and heavy emphasis on domestic violence (real or perceived) as a basis to eject First Nations members from their homes.

No doubt the Courts will be made busy with interpretations of the 'interplay' between the Indian Act and this Legislation. Applications, Hearings, Reviews and Rehearings in the Courts will become more frequent.

One cannot read the Bill and not come away with the view that it will **facilitate** non-Indian occupation of Band Homes On Reserve. While the option is available to oust the PFR's with First Nation Laws, Courts will, no doubt, be loath to uphold such laws that significantly conflict with the types of provisions set out in the PFR's.

***Recommendation:** First Nations lobby **against** this Legislation in favor of an Option which creates both a legislative and judicial framework for First Nations to control their own Family Law Affairs.