Memorandum

TO: Chiefs of Ontario (COO)

FM: M. Sherry

RE: Federal Bill C-47 (*Family Homes on Reserves and Matrimonial Interests or Rights Act*), or the Matrimonial Real Property (MRP) Bill

DT: March 7, 2008

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1 Bill C-47 was tabled in Parliament for first reading on March 4, 2008.

2 The Bill imposes a single national MRP code (the "Provisional Federal Rules"), as set out in sections 18 to 56. This represents about 75% of the content of the Bill. The code appears to represent an averaging out of the MRP regimes from the Provinces and territories, including that of Ontario. The code is not a duplicate of any particular provincial or territorial MRP regime, but is strongly influenced by the typical provincial/territorial MRP regime.

3 The Bill does not adopt provincial law by reference or incorporation, which was an option available to the federal government. Instead, there is a single uniform federal MRP code that is substantive and is imposed on all First Nations in Canada. This might be described by some as the "cookie cutter" approach.

4 Under the Bill, there are three basic options for First Nations to avoid or replace the federal uniform MRP code. The first two options are separate MRP regimes under the *First Nations Land Management Act* or under self-government agreements. These options only apply to a very small number of First Nations in Canada, though there may be few in Ontario under the

FNLMA. The third option, created by the Bill, is for a First Nation to pass MRP laws to replace the federal uniform code. This option is set out in sec. 7 of the Bill.

5 Some of the language in the Bill suggests how the federal government probably intends to "sell" the Bill and speed its passage. The uniform MRP code is described as "Provisional", in the sense that it may be replaced by First Nation laws under sec. 7. The federal government will probably describe the code as a temporary but necessary measure designed to protect the rights of women and children. The federal government will probably emphasize the First Nation option to replace the uniform code with local laws. The federal government has used the optionality argument with success in the past to undermine criticism of First Nation legislation; for example, the *FNLMA* and the *Fiscal Institutions Act*. The optionality argument will probably be used in particular to undermine the argument that the Bill should be subject to a lengthy national consultation. In common terms, the federal government will say something like: "Why worry? If you don't like the provisional rules, pass your own local laws.". The optionality argument may also be used to discourage any close scrutiny of the very complex uniform code. Again, in common terms: "Don't get excited about the content of the provisional rules - you can replace them when you want.".

6 The option of passing replacement laws may be an illusion for most First Nations. The federal code will have a certain inertia and may be favoured in practice by provincial administrators. It would be a very expensive exercise to develop and administer an alternative code. Based on past experience, it seems unlikely that the federal government will provide realistic funding to enable First Nations to develop local codes in a careful manner. At best, there might be pro forma or "slap dash" funding (eg. $10,000. per community). First Nation codes that vary significantly from the uniform code may be subject to legal challenges based on individual rights, including the "rights" of non-members. In other words, in practice, the federal uniform code will have a big gravitational pull that will be difficult to pull free of.

7 With this general background in mind, the memorandum will review some of the

particular provisions of the Bill.

8 The second recital (Whereas) of the Bill describes in general terms the area of MRP covered by the Bill. The Bill is designed to give rights and remedies to spouses and common law partners during their relationship, on relationship breakdown, and on death in relation to: (1) the family home on reserve; and, (2) the division of the value of any interests or rights the spouses or common law partners hold in structures and lands on reserve. For the Bill to apply, one spouse or common law partner in a relationship must be a First Nation member or status: sec. 6.

9 The fourth, fifth, and sixth recitals of the Bill contain general statements about the federal position on the inherent right to self-government. The fourth recital is a relatively positive confirmation by Canada that it recognizes the inherent right as an aboriginal right. Note that this recognition is very much in the abstract. In practice, Canada reserves the right to right to take the position that a particular First Nation is not a holder of the aboriginal right to self-government, based on the strict *Vaderpeet* test. Even the abstract recognition of the right in the fourth recital is somewhat diminished by the assertion that implementation of the right is best achieved by negotiations. The implication is that the federal government does not favour independent law making by First Nations.

10 The fifth recital states that the content of the Bill is not intended to define the scope of any First Nation's inherent right or to limit self-government negotiations. However, this is quite disingenuous. The fact that the federal government believes it has the right to impose an MRP code on most First Nations is not very comforting in terms of a positive understanding of the inherent right. The premise of the Bill is that the only real option for First Nations to get around the code is to pass delegated laws under the Bill, and not independent laws pursuant to the inherent right. Also, the uniform code set out in the Bill is likely to have a limiting effect on the scope of self-government negotiations.

11 These troublesome themes come together in the sixth recital. The federal position is that the delegated MRP law-making mechanism of the Bill is consistent with the *Constitution Act, 1982*, including, necessarily, sec. 35. That position is very negative in terms of the inherent right and the inclusion of family law jurisdiction within the inherent right.

12 A review of the three recitals dealing with the inherent right indicates that the Bill is a very serious threat to the inherent right, particularly in relation to family law jurisdiction. This is particularly troublesome as family law has generally been recognized as one of the most likely areas of independent law making pursuant to sec. 35 (eg. the Charlottetown Accord of 1992). The Bill stands for the proposition that the federal government can pass legislation imposing a uniform MRP code and then tell First Nations seeking an alternative that they are limited to delegated federal legislation (First Nation "laws" under the Bill). This precedent has the potential to hollow out the potential family law jurisdiction attached to the inherent right.

13 In sec. 2 (1) of the Bill there is a definition of a "designated judge". These designated judges play a role in the implementation of the uniform MRP code. A designated judge must be authorized by a provincial government. There will be serious implementation problems if some Provinces decide not to designate judges, motivated perhaps by funding concerns.

14 The definition of a "family home" in sec. 2 (1) of the Bill is not limited to structures to that are affixed to reserve land. This would bring in mobile homes, trailers, and other possibilities.

15 There is a definition of "interest or right" in sec. 2 (1). This definition becomes important when on-reserve rights and interests are valued and divided. The definition includes Certificates of Possession (CP), permits, and leases. It also includes in ©) a category of rights and interests that are not set out in the *Indian Act*, but which are recognized by a particular First Nation. This interesting and undefined category might cover non-CP situations which are more common in the northern part of the Province.

16 Section 5 provides various reassurances that the Bill cannot have the effect of altering the basic nature of reserve land, under the *Indian Act* and sec. 91(24) of the *Constitution Act, 1867*. This is a talking point or cosmetic insertion meant to deflect the criticism that the Bill will lead to the loss of reserve land. It may well be true that reserve land will not be lost in an ultimate sense. However, this may be a question of splitting hairs. The fact is the uniform code will lead to long-term (at least) possessory rights for non-members, with incalculable effects, particularly in the South and mid-North.

17 Section 7(1) outlines the new power of a First Nation to pass "First Nation laws" in relation to MRP. The scope of MRP law making is as set out in the second recital: spouses and common law partners during a relationship, on relationship breakdown and on death, in relation to the family home on reserve and the division of interests relating to structures and land on reserve. The laws covered by sec. 7(1) are called "First Nation laws", but, from a technical point of view, they are no different than bylaws under the *Indian Act*. They are a delegated form of federal legislation. There is no inherent First Nation authority involved.

18 It is noteworthy that sec. 7(1) refers to First Nation laws in the plural form. At one level, this merely means that the First Nation can pass multiple and amended laws over the years. However, at a deeper level, the plural form probably means that the First Nation cannot deal with MRP on a piecemeal basis and expect to replace the federal code. If a First Nation wants to replace the code, it is probably obliged to deal with MRP (as defined by Canada) on a comprehensive basis. This increases the practical challenge of exercising the option of passing MRP laws. The issue of whether the First Nation is required to pass a comprehensive code is a very important point of interpretation in terms of assessing the overall impact of the Bill.

19 Section 7(2)(a) provides that a First Nation law may include administration provisions. This raises the issue of how the First Nation will pay for ongoing administration. The expected lack of federal funding for ongoing administration will greatly undermine the option of First Nation law making.

20 Section 7(2)(b) provides that a First Nation law can reduce or eliminate the protection of sec. 89 of the *Indian Act* for the purposes of enforcement of property division rulings and agreements. This seems to suggest that sec. 89 will not be affected the federal uniform code, but this interpretation issue should be reviewed more closely.

21 Section 7(3) provides that a First Nation must notify the Province when it intends to pass its own MRP laws. This is because such MRP laws will only work if they are administered in the provincial court system. This raises the issue of whether the Province will agree to administer First Nation MRP laws, no matter what they contain. The Province may take the position that it will not administer MRP laws that it takes issue with, whether on rights or other grounds. In practice, the Province will become more uncomfortable as a First Nation MRP law departs more and more from the provincial regime and/or the federal code. If this is the trend, the gravitational pull of the federal uniform code will only be increased.

22 Sections 8 to 16 of the Bill describe the procedure that must be followed by a First Nation to pass an MRP law. This emphasizes the fact that the law-making exercise here is delegated and strictly controlled by the federal government, and not consistent with the inherent right. The procedural requirements are significant, and somewhat reminiscent of what is required for intoxicant bylaws under the *Indian Act*. The extent of the procedural requirements will make it difficult for many First Nations to ever get beyond the uniform code.

23 A very negative feature of the procedure is the “Verification” mechanism outlined in sections 8 to 10. The fact that the overall procedure (secs. 8 to 16) is followed to the letter must be certified by a “verification officer” or VO.

24 Section 9 provides that the VO shall be jointly appointed by the federal government and the First Nation. This creates the illusion of mutuality. In reality, it means the federal government will have a veto. If the First Nation is committed to proceeding with an MRP law under the Bill, the First Nation cannot be “difficult” on the VO appointment issue. It must in the end agree to someone who is okay with the federal government. If there is a standoff, there is no

pressure on Canada, which can simply rely on its uniform code. All the pressure will be on the First Nation to concede the point.

25 Section 8 provides that the federal government can delegate the VO function to an "organization". As the VO must be unbiased [sec. 9(2)], the organization cannot be one controlled by the First Nation, like a Tribal Council. It will be interesting to see if INAC nominates one of the new fiscal institutions as the VO of choice, possibly the Tax Institute. Such an open-ended appointment would secure long term and lucrative work for the fiscal institutions. This assumes that the federal government will pay for all or part of the VO function. Based on the fiction of joint appointment, the federal government may take the position that the VO should be paid for jointly, or even 100%, by the First Nation.

26 Sections 8 to 16 make it reasonably clear that the VO certification is supposed to be limited to procedural issues (notices, votes, etc.). There is no explicit authority for the VO to reject a First Nation law over its content, assuming all of the procedural steps are met. However, in practice, the VO function may have a levelling or standardizing effect on First Nation MRP laws. The federally approved VO's may advocate on behalf of standard models developed by the federal government. This levelling effect may be particularly strong if the federal government appoints a single VO agency for the country, along the lines of one of the fiscal institutions.

27 As the VO will only officially sign off on procedural issues, the First Nation will be responsible for the contents. This may create unfunded liability issues if MRP laws are challenged based on rights and other grounds.

28 The role of the VO is not small, even though it is limited to procedure. According to sec. 10(1), the VO must agree in advance to the proposed procedure to pass the law. If the VO is not satisfied with the proposed procedure, the First Nation is not permitted to officially submit the draft law to its membership - sec. 11(1)! This appears to be a rather shocking intrusion into local affairs. The VO is required to observe the conduct of the vote: sec. 12(1). Even after a

positive vote, the MRP law is not valid until it is certified by the VO: sec. 15(4).

29 The approval procedure for a First Nation MRP law features a vote. Based on *Corbiere*, the vote must include non-resident members: sec. 11(2). There is no difference in this regard for *Indian Act* and custom election First Nations.

30 Section 13 (1) sets out the basic standard for voter approval. A majority of eligible voters must participate in the vote, and a majority of those must approve the proposed First Nation law. There is a further fail-safe position stated in sec. 13(2), i.e. in all cases, at least 25% of the eligible voters must approve the law. These standards will make things difficult, if not impossible, for communities where eligible voters do not turn out for one reason or another; for example, communities where "traditional" people refuse to participate in *Indian Act* elections. In such communities, there will be no alternative to the federal uniform code, except implementation of the inherent right.

31 Section 15(3) sets out another critical role for the VO. If the procedure, including the vote, is certified by the VO, it is the VO, and not the First Nation that notifies the federal and provincial governments and provides them with a copy of the law. The disconnect between the community and its own law is troubling.

32 Generally speaking the entire VO process is very demeaning and inconsistent with even a moderate conception of the inherent right. First Nations are treated as sub-municipal bodies that cannot be trusted to pass a local law dealing with family property. Instead, a federal agent (VO) must be present to ensure that the First Nation does not go astray. There is a strong suspicion that the VO will act as the eyes and ears of the federal government, and will be keenly interested in not only procedural issues, but also the substantive content of MRP laws.

33 Section 16(5) provides that a First Nation may repeal its MRP laws. The method of repeal may not have to involve a reverse community vote - sec. 7(2). If the MRP laws are repealed, the First Nation would presumably revert to the federal uniform code.

34 Section 17 of the Bill deals with the interplay between the federal uniform code and First Nation MRP laws (as well as codes under self-government agreements and the *FNLMA*). The federal code applies unless it is replaced by validly enacted First Nation MRP laws. Note the plural form of the word "laws". In combination with the wording of sec. 7(1), the effect appears to be that a First Nation must pass comprehensive MRP laws to replace the federal code. Piecemeal MRP measures will not have the replacement effect. Otherwise there would be a patchwork of rules derived from the federal code and the First Nations MRP laws, not to mention the background effect of provincial laws. This is a very important point of interpretation in terms of assessing the option of passing MRP laws. It is possible that the federal government will use the VO function to ensure that only comprehensive MRP laws are developed and passed.

35 As noted, the federal uniform code is set out in secs. 18 to 56, constituting the bulk of the Bill. In the selling of the Bill, the federal government may downplay the content of the code, describing it as a provisional or default option, and emphasizing the First Nation option to pass local MRP laws. However, for the reasons outlined above, it is quite likely that the federal code will apply to most First Nations on a permanent basis. Therefore, there should be strong resistance to the federal suggestion that only light review of the actual code is warranted.

36 The uniform code in secs. 18-56 is very complex and legalistic. In terms of consultation on the Bill, it will be very challenging to summarize the code in understandable non-legal language. This is particularly true when translation issues in the North are taken into consideration. The complexity of the federal code is perhaps the most compelling argument in favour of a lengthy and careful consultation on the Bill across the country. The kind of consultation that is justified probably exceeds what the federal government wants to do, by a significant margin.

37 As a matter of due diligence, there should be a comparison between the content of the code and the current state of family law in Ontario. What are the differences and similarities? A

similar exercise should occur in every Province and Territory. Otherwise, First Nations will be taking on a black box. Again, this is a very powerful argument for a multi-year consultation process on the Bill.

38 More detailed comments on the content of the uniform code will be prepared under separate cover. Some key points are set out below.

39 Section 18 of the Code provides that during a relationship, each common law partner or spouse has the right to occupy the family home on reserve. This explicitly includes non-Indian people and non-members. This is a significant increase in the on-reserve residential rights of non-members. This provision will overrule First Nations that may have passed bylaws excluding non-members and non-Indian people.

40 Section 20 seeks to prevent the spouse or partner holding title to the family home from transferring the title or any interest without the consent of the other spouse or partner, during a relationship. This protection is extended to non-Indians and non-members.

41 Section 21 deals with temporary exclusive occupation orders where there is evidence of violence or similar circumstances.

42 Section 25 deals with permanent exclusive occupation orders. These may be made in favour of non-members and non-Indian people. This is a very significant departure from the current state of the law. The orders may be made in relation to a relationship breakdown and death (sec. 26). Exclusive occupation orders do not affect underlying title and legal interests: sec. 28.

43 Section 33 deals with the valuation and division of marital interests and rights upon relationship breakdown. Generally speaking, each spouse or partner is entitled to 50% of the valued marital interests and rights. The definition of “matrimonial interests or rights” in sec. 2(1) excludes certain gifts and bequests, as is usual under provincial MRP regimes. The

valuation and division mechanism applies to non-members: sec. 33(3).

44 Section 39 deals with the valuation and division of marital interests and rights on the death of one spouse or partner.

45 Section 46 is a general procedural provision which requires early notice of most court applications to the First Nation Council. There is an exception for emergency protection orders in family violence situations, possibly leading to temporary exclusive possession orders. Having received notice, the First Nation Council has the right to participate in court hearings and make representations on behalf of the First Nation (the "cultural, social, and legal context that pertains to the application"). This could be a valuable procedural right in some instances. However, getting a word in edgewise may be difficult, as the code is geared to the rights of individual spouses and partners (including non-Indian people), as opposed to collective rights. Also, the bitter experience of Band Representatives under the *Child and Family Services Act* suggests that the procedural right will not amount to much unless the federal government is prepared to provide new participation funding. Given the open-ended cost of litigation, it is highly unlikely that INAC will help. In summary, the procedural right, though interesting, may not amount to much.

46 Section 60, the last provision of the Bill, indicates that the Act will not come into force until proclaimed by Cabinet. Canada may use this standard kind of provision to argue against extensive consultation. Especially in a minority Parliament situation, Canada may argue that it is prudent to pass the Bill quickly and then defer proclamation, permitting "consultations" at that point. However, this would be a very prejudicial to First Nations. After passage, there would be little or no leverage to force consultations. The substantive debate, having never occurred, would be over. There would be little to stop the Cabinet from simply proclaiming the Bill into force on some quiet day in the future.

47 The original fiduciary and consultation case, *Guerin*, stands for the proposition that when reserve lands are affected in a significant way by a federal action (in this case, Bill C-47),

the federal fiduciary duty is engaged, including the duty to consult. Given the national impact of Bill C-47 and the new rights accorded to non-members and non-Indians on reserve, it seems clear cut that the duty to consult and (now) accomodate is engaged at a very high level indeed. This duty is constitutional in nature, tied to sec. 35 of the *Constitution Act, 1982* and sec. 91(24) of the *Constitution Act, 1867*. It is not clear whether First Nation consent (the highest threshold) is required as a matter of law: *Delgamuuk*. It would be possible to take the political/legal position in this instance that First Naiton consent is required.

48 The rights accorded to non-members and non-Indians may have a significant impact on reserve life, especially in the South and mid-North. The long-term impact may be as significant as the status rule amendments to the *Indian Act* in 1985.

49 Quite apart from the consultation/consent issue, the Bill C-47 package is problematic based on the inherent right. Family law is one of the strongest potential areas of independent jurisdiction flowing from the inherent right. However, the Bill stands for the backward proposition that Canada has the right to impose a national MRP code on all First Nations. The only outlet is for First Nations to pass delegated federal laws under the watchful eye of a modern day Indian Agent (the VO). Passage of Bill C-47 would be an extremely negative precedent for the inherent right, including family law jurisdiction.

50 INAC may push for quick passage of the Bill based on purported interest in the rights of women and children in MRP situations. An important message is that First Nations are more interested in such rights than INAC will ever be. However, it is a question of method. Bill C-47 is not the right method. Instead, First Nations should be encouraged to pass independent laws based on the inherent rights. Canada should facilitate this alternative process by providing financial and other resources. The best thing Canada could do right now is inject new money into First Nation housing. This would help families much more than the rights and litigation approach of Bill C-47.

51 Bill C-47 creates the illusion that Canada is acting to help First Nation families,

particularly women and children. However, the approach is legalistic and formal, with little or no expectation of necessary financial resources. If the Bill is passed, spouses and partners will have to hire lawyers to enforce their rights, resulting in expensive and lengthy legal battles. This is not a practical option for many people on reserve. Much of the Bill may become a dead letter, except for a few well-to-do and, possibly, non-Indian, people.

52 Canada may argue that only a short consultation on the Bill is justified, based on a couple of points. First, Canada may point to general discussions over some years before the Bill was tabled. However, these discussions were conceptual only. Now that a real and very complex Bill is on the table, extensive consultation is required, taking several years. Second, Canada may point to the optionality of the national code. However, for the reasons stated above, the practical reality is that the national code will be permanent for most First Nations. Again, at the very minimum, full consultation is required.

53 Particular recommendations for consideration by the PC are set out below.

54 Recommendation. It is recommended that the PC should take the position that First Nation consent is required for something like Bill C-47. Pending that consent, a careful multi-year consultation process is required. Some estimates are that 5 years may be required. The consultation process should not be limited to Bill C-47 but should also consider alternatives, such as new funding and implementation of the inherent right. These positions should be expressed by letter, meetings, and by other means.

55 Recommendation. An information package should be sent to the PTO's and First Nations as soon as possible.

56 Recommendation. An existing or ad hoc committee, with PTO and Independent representation, should be tasked to work on this issue on an ongoing and priority basis, always reporting to the PC. It will be important to follow the federal legislative process, work with the opposition parties and the media, and coordinate with the AFN.

57 Recommendation. Existing resolutions should be checked. The direction of the PC and the committee can be confirmed at the next Chiefs Assembly.