LEGISLATIVE DEVELOPMENTS RELATED TO RESERVE LAND

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Aboriginal Law: Current Issues
Hosted by Pacific Business & Law Institute
May 7th & 8th, 2013 in Vancouver, BC

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I. INTRODUCTION

The Conservative government continues to tinker with provisions of the *Indian Act* and enact both mandatory and voluntary legislation to carry out its Aboriginal agenda. A number of recent legislative changes have taken place with more on the way. This paper examines four of these legislative changes, two of which are currently in force.

II. AMENDMENTS TO THE LAND DESIGNATION PROVISIONS OF THE *INDIAN ACT* EFFECTED BY BILL C-45

A. OVERVIEW

One little noticed impact of Bill C-45, the omnibus *Jobs and Growth Act, 2012*, were changes made to the *Indian Act* designation procedures. One of the frequently cited impediments to economic development on reserve has been the cumbersome process for First Nations to designate lands for lease. While recent amendments to the *Indian Act* have arguably streamlined the process they have placed significant discretion with band councils and the Minister of Aboriginal Affairs and Northern Development (the "Minister").

B. THE PROBLEM

Since the *Royal Proclamation of 1763*, it has been the policy of initially the Imperial Government and now the federal government that before an interest in Indian lands could be granted to a third party, whether by lease or sale, such lands would have to first be surrendered to Her Majesty. By this method, the Crown interposed itself between the First Nation and any third party who it might do business with.[1] Amendments to the *Indian Act* in 1985 (known as the "Kamloops Amendments"), introduced a distinction between surrenders, generally for sale, and designations for lease. However, the process by which a First Nation surrendered or designated its land remained the same. Given the communal nature of reserve landholding, the members were required to approve allowing a portion of the reserve to be sold or leased to third parties.

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[1] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 383

Section 38 provides:

> 38(1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.
>
> (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

This section remains unchanged. Previously, section 39 of the *Indian Act* required that a quorum of 50 percent plus one of the members to vote (the "Double Majority") in a surrender or designation in order for it to be considered valid. If they were unable to reach the quorum, but a majority of those that voted, voted in favour, then the Minister could order another vote. In that case, the second vote would only require a simple majority.

What further complicated the situation for First Nations was the impact of the Supreme Court of Canada decision in *Corbiere*.[2] While the case held that off-reserve members should be allowed to vote in band council elections, its impact extended beyond elections into designations. Previously, off-reserve members were not allowed to vote on surrenders or designations either. Subsequent to *Corbiere*, off-reserve members were entitled to vote, leading to significant changes in the notice requirements under the *Indian Referendum Regulations* and allowance for mail-in ballots. Many First Nations have a significant off-reserve population. However, the extension of the right to vote to off-reserve members did not in many cases lead to increased participation. One of the unintended consequences of *Corbiere* was that most First Nations could not meet the Double Majority and a second vote was required.

One further complication was that the Federal Court held that the reference to the Minister in section 39(2) was to the actual Minister or Deputy Minister of Indian Affairs, leading to the absurd result that a first vote could be ordered by a bureaucrat in a Regional Office (eg. Manager of Lands), but a subsequent vote was required to be signed off by the Minister or his Deputy.[3] This led to further delays in the process. Finally, Governor in Council approval was required which could take a minimum of six months and the timing was dependent upon whether the House of Commons happened to be sitting.

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[2] *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203.
[3] *Hill v. Canada*, [1999] 3 CNLR 106 (F.C.)

C. PARLIAMENT'S SOLUTION

Section 39 has been amended to take out all references to designation:

> 39(1) An absolute surrender is void unless
>
> (a) it is made to Her Majesty;
> (b) it is assented to by a majority of the electors of the band
> (i) at a general meeting of the band called by the council of the band,
> (ii) at a special meeting of the band called by the Minster for the purpose of considering the absolute surrender, or
> (iii) by a referendum as provided in the regulations; and
> (c) it is accepted by the Governor in Council.
>
> (2) Where a majority of the electors of a band did not vote at a meeting or referendum called under subsection (1), the Minister may, if the proposed absolute surrender was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice of that other meeting or another referendum as provided in the regulations.
>
> (3) Where a meeting or referendum is called pursuant to subsection (2), and the proposed absolute surrender is assented to at the meeting or referendum by a majority of the electors voting, the surrender is deemed, for the purposes of this section, to have been assented to by a majority of the electors or the band.

Section 39.1 provides a simpler procedure:

> 39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

Thus, the process has been greatly simplified. While there are procedural protections built into the *Indian Referendum Regulations*, including timelines and the participation of off-reserve voters, there is no longer a quorum requirement. However, the band council is now required to recommend to the Minister the approval of the vote. Finally, it is the Minister as opposed to the Governor in Council who approves the designation. On their face, these amendments will significantly reduce the amount of time that it may take to complete the designation process.

D. ANALYSIS

Clearly, there was a problem with the amount of time that it took a First Nation from the decision to designate its land until approval of the Governor in Council to accept the designation, which is a prerequisite to lease the land to a third party. However, the elimination of the Double Majority as the answer to the problem likely will lead to future litigation. The main issue that arises is the elimination of the quorum requirement. Virtually all organizations, including government and corporations have established minimum requirements for meetings of their members. In the corporate context, if the quorum is not met, the meeting is adjourned to a later date, at which time those members that show up for the meeting constitute the quorum.

The elimination of this requirement from the designation process may lead to mischief on the part of certain band councils. To date, the Department of Indian Affairs and Northern Development have not developed any policy for the threshold that it will use to determine whether the designation will be accepted. The requirement of band council approval does not immunize the Minister's decisions from review. While eliminating the requirement of Governor in Council approval may expedite the process, it seems on the face of it to be contrary to centuries of government practice (eg. that surrenders/designations are made to Her Majesty or Her Majesty's designate).

One may expect that there will be much litigation regarding Ministerial decisions on designations given the lack of a quorum requirement. The government currently does not have any policy to guide the Minister in determining whether to accept a designation.

In the author's view, there was a simpler, less risky solution to the problem. First, the government, through a minor amendment to the *Indian Act* could have clarified that the Minister is not required to call a second vote, which would have resolved the issue in the *Hill* case. Second, the timelines in the *Indian Referendum Regulations* could have been substantially relaxed. Currently, the notice requirements are 49 days for a first vote and 35 days for a second vote. These notice periods could have easily been relaxed to 30 and 15 days respectively, which is fairly standard in corporate circles. The government could have also considered a minimum threshold, less than fifty percent, plus one for a first vote to pass (eg. twenty-five percent of eligible voters), but chose not to do so, either legislatively or by policy.

Thus, while the new designation process may seem attractive at first glance, like an iceberg, there are hidden dangers lingering beneath the surface.

III. BILL S-2: *FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT*

A. OVERVIEW

One of the major weaknesses of the *Indian Act* is that it fails to explicitly address elements of family law, such as the division of property on marriage breakdown.

1. Context

The *Constitution Act 1867* sets out the division of powers between the federal and provincial governments with section 91 providing the federal government with a residuary plenary power, and section 92 allowing the provinces to retain jurisdiction over property and civil rights, and local and private matters. Pursuant to section 92(13) of the *Constitution Act 1867* jurisdiction regarding the division of matrimonial real and personal property lies with the Province. While section 91(24) provides Parliament the power to make laws in relation to 'Indians, and lands reserved for the Indians'. [4]

However, some provincial laws apply some of the time. Section 88 of the *Indian Act* provides that:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nation Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

The Supreme Court of Canada explained the purpose of section 88:

> Section 88 reflects Parliament's intention to avoid the effects of immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law. [5]

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[4] Peter W. Hogg, *Constitutional Law of Canada*, (Toronto: Thomson Carswell, 2006) at p. 616.
[5] *R. v. Morris*, [2006] 2 S.C.R. 915 at 935.

It is important to note that the section limits its application to "Indians". Lands reserved for Indians are not covered by the section, limiting the scope of provincial laws of general application.

In *Derrickson*, the Supreme Court of Canada was faced with the issue of equitably dividing property in a divorce proceeding.[6] The court held that the provisions of the *Family Relations Act* that deal with the right of ownership and possession of real property, while valid in respect of other immovable property, cannot apply to lands on an Indian reserve, as it is the core of section 91(24) jurisdiction of the federal government.[7] However, the court held that other aspects of the *Family Relations Act*, dealing with compensation could be applied in the event of marriage breakdown.

Derrickson is but one example of the jurisdictional quagmire facing on-reserve spouses. People residing on reserve have historically been denied access to a legislative means for resolving disputes regarding matrimonial property. Generally, non-interest holding spouses were unable to either occupy or receive a division of value for real property located on reserve after the breakdown of a relationship, or upon the death of their spouse.

2. Background to Bill S-2

Bill S-2 attempts to remedy this "legislative gap."[8] Parliamentary debate regarding amending the *Indian Act* to address the application of provincial and territorial matrimonial property law on reserves began in 2003.[9] In 2006, the federal government appointed Wendy Grant-John[10] to assist with a consultation process regarding matrimonial real property on reserves. The objectives of her mandate were to identifying the most viable legislative means for:

a. Considering the rights of First Nations women;
b. Respecting the *Canadian Charter of Human Rights and Freedoms* (the "Charter") and the *Canadian Human Rights Act*;
c. Consistency with provincial/territorial legislation, and

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[6] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285
[7] *Derrickson* at para. 43
[8] Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 1
[9] In November of 2003 the Standing Senate Committee on Human Rights' recommended Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 2.
[10] Ms. Grant-John was appointed as a ministerial assistant to Jim Prentice, Minister of Indian Affairs and Northern Development Canada.

d. Balancing individual equality rights guaranteed by sections 15 and 28 of the Charter, with the collective aboriginal and treaty rights recognized in s. 35 of the Constitution Act, 1982.[11]

The 2006/2007 consultation considered First Nations' jurisdiction over matrimonial real property and whether to incorporate provincial matrimonial laws through amending the *Indian Act*, or creating stand-alone legislation. The results of this consultation highlighted concerns regarding the effectiveness of any proposed legislation given difficulties with: accessing courts; enforcing court orders on reserve; the on-reserve housing shortage; and accessing resources to implement the legislation.[12] Importantly, the participants overwhelmingly rejected any application of provincial laws.[13]

Since 2006-2007, Bill S-2 is the fourth attempt[14] to create legislation regarding division of interests or rights in a matrimonial home located on reserve. Bill S-2 received Third Reading before the Senate on December 1, 2011. It was then referred to the House of Commons where First Reading was completed on December 8, 2011. However, Bill S-2 has not proceeded to any further readings before the House of Commons since that time.[15]

B. ELEMENTS OF THE BILL

The stated purposes of Bill S-2 are two-fold:

1. To enable First Nations to pass laws regarding:
   a. the occupation and possession of family homes located on reserves, and

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[11] Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 2.
[12] Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 2
[13] Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 2 and 3.
[14] Library of Parliament Research Publications, *Legislative Summary of Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act*, Revised 24 January 2012, at page 1 provides:

> *The bill was first introduces as Bill C-47, however, Bill C-47 died on the Order Paper when Parliament was dissolved on 7 September 2008. It was reintroduced as Bill C-8, which died on the Order Paper when Parliament was prorogued on 30 December 2009. It was introduced a third time as Bill S-4, which was passed by Senate and then introduced in the House of Commons on 22 September 2010, however, Bill S-4 died on the Order Paper when Parliament was dissolved on 26 March 2011*.

[15] Parliament of Canada, *LEGIS info, Status of the Bill,* http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5138145&View=0

b. the division of the value associated with structures or real property located on reserve upon the breakdown of the conjugal relationship or the death of a spouse; and

2. To establish provisional rules and procedures that apply until such time as individual First Nations enact their own laws regarding the occupation, use, possession and division of value of property located on reserve.[16]

Bill S-2 only applies when at least one of the spouses or common-law partners (collectively "Spouses") is a First Nation member or an Indian.[17] While it does not affect title,[18] Bill S-2 does enable the transfer of rights to an interest in reserve land to a non-First Nation spouse or survivor.[19]

1. Enabling First Nations to pass matrimonial real property laws

Bill S-2 provides the authority for a First Nation to enact its own laws respecting the use, occupation and possession of family homes on reserve and the division of the value of any interests or rights to structures and lands on its reserves.[20] However, any MRP law enacted by a First Nation must include appeal procedures, provisions for administration and enforcement of the law on reserve.[21] Further, approval of any MRP law requires approval by a majority of not less than twenty-five percent of eligible voters,[22] or such other majority as determined by Council.[23] Once an MRP law comes into force judicial notice of the law is taken in any proceedings.[24]

2. Provisional Rules and Procedures regarding the occupation, use, possession and division of matrimonial real property

Given the varying degrees of self governance and law-making capacities between individual First Nations, Bill S-2 provides provisional rules and procedures relating to the occupation, use, possession and division of MRP. In particular, the proposed legislation

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[16] Bill S-2 Clause 4
[17] Bill S-2 Clause 6
[18] Bill S-2 Clause 5
[19] Bill S-2 Clause 31
[20] Bill S-2 Clause 7(1)
[21] Bill S-2 Clause 7(2)(a) and (b).
[22] Bill S-2 Clause 9(1).
[23] Bill S-2 Clause 9(3) provides that Council may by resolution, increase the percentage of eligible voters required under subsection (2).
[24] Bill S-2 Clause 11(1).

addresses general occupation of a family home, Emergency Protection Orders,[25] and Exclusive Occupation Orders. Bill S-2 also includes provisions for the division of matrimonial interests or rights on the breakdown of a conjugal relationship, or upon the death of a Spouse.

There are several elements of note in the bill, detailed below.

1. Occupation

   With respect to general occupation, a spouse may occupy the family home regardless of whether or not they are a First Nation member or an Indian. A spouse that holds the interest or right to the family home is also required to obtain the written consent of the other spouse prior to disposing or encumbering their rights or interest in the family home.[26] In addition, a survivor who does not hold an interest or right in the family home may continue to occupy the family home for 180 days after the death of their spouse.

2. Emergency Protection Orders

   In circumstances where a serious or urgent situation involving family violence occurs, a spouse can bring an *ex parte* application seeking a 90-day order for interim exclusive occupation of the family home and removal of the other spouse or any person who habitually resides at the family home ("Emergency Protection Order").[27,28] Similar to the new British Columbia legislation governing family law,[29] "family violence" includes actual or threatened acts of bodily harm, sexual assault, unlawful confinement, criminal harassment, or damage to property, regardless of whether it involves an intentional or reckless act.[30] Further, an application for an Emergency Protection Order can be brought on an application by either a spouse or by a Peace Officer on behalf of the spouse, either with or without that spouse's consent. An Emergency Protection Order may also be granted regardless of whether or not criminal charges occur or a conviction is entered.

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[25] See Bill S-2 Clauses 16(1) to 19(2).
[26] Bill S-2 Clause 13 and 15(1)
[27] Bill S-2 Clause 16(1).
[28] Bill S-2 Clause 16(5).
[29] *Family Law Act*, S.B.C. 2011, Chapter 25 at Part 1
[30] Bill S-2 Clause 16(9)(a) to (f).

An Emergency Protection Order is also subject to an immediate review by the Supreme Court of British Columbia. Specifically, within three days the court must either confirm the Emergency Protection Order, or, if the court is of the view that the original evidence was insufficient to support the making of the Emergency Protection Order, the court may then set the matter down for rehearing. [31] In these circumstances the Emergency Protection Order remains in effect until the rehearing is concluded and the Emergency Protection Order is either confirmed, revoked, or extended.

At a rehearing, the Court may, in addition to the original evidence, also consider evidence regarding the collective interests of the First Nation members on whose reserve the family home is situated.[32] With the exception of the initial *ex parte* application for an Emergency Protection Order, Bill S-2 requires for Council to be given immediate notice of any application for an order,[33] and for copies of any Orders obtained to be immediately forwarded to Council.[34]

Any person vacated from the family home as a result of the Emergency Protection Order person can also apply to vary or revoke the Order. However, their application must occur either within 21 days after receiving notice, or at any time that a material change of circumstance occurs.[35]

Confidentiality is a key consideration regarding proceedings for Emergency Protection Orders. Therefore, members of the public may be excluded from all or part of a rehearing. In addition, the Court may also impose publication bans relating to any information arising from either the proceedings, and prohibit disclosure of any related document.[36]

3. Exclusive Occupation Orders

Similar to the Emergency Protection Order provisions, under Bill S-2 a court may grant either a spouse or a survivor, Exclusive Occupation and reasonable access to a family home regardless of whether or not they are a First Nation member or an

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[31] Bill S-2 Clause 17(1) to (7).
[32] Bill S-2 Clause 17(1) to (7).
[33] Bill S-2 Clause 41(1).
[34] Bill S-2 Clause 42.
[35] Bill S-2 Clause 18.
[36] Bill S-2 Clause 19.

Indian.[37] However, any order granted on the basis of an Emergency Protection Order is revoked to the extent specified, upon the court granting an order for exclusive occupation.[38]

An order for Exclusive Occupation may require a spouse to vacate the family home, and prohibit them from re-entering the family home. In turn, such an order may also require the occupying spouse or survivor to preserve the condition the family home, or to provide payment to the other spouse for alternative accommodation, or payment for all or part of any repair and maintenance of the family home.[39]

In granting an Exclusive Occupation or reasonable access to either a spouse or a survivor, the court must consider a multitude of factors, including but not limited to:

a. the best interests of any children, and their ability to maintain contact with their First Nation;
b. the collective interests of the First Nation members in their reserve lands; and
c. specifics relating to the relationship:
    i. the length of time that the parties have resided together on reserve;
    ii. the history of family violence;
    iii. the terms of any will or agreements between the parties;
    iv. the medical condition of the survivor;
    v. the availability of other suitable on-reserve accommodation, and
    vi. the significance of the value of the family home in relation to the overall value of the estate.[40]

In addition to the above-noted factors, a court must also consider the interests of any disabled elderly person who habitually resides at the residence, or whether anyone other than the spouses, holds an interest or right in or to the family home.[41] Importantly, neither an Emergency Protection Order nor an order for Exclusive Occupation, changes who holds an interest or right in the family home. However, any spouse, regardless of whether they retain the interest or right in the family home, that contravenes either an Emergency Protection Order or an order of Exclusive Possession is guilty of an offence punishable on summary conviction.[42]

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[37] Bill S-2 Clause 20(1), and Clause 21(1).
[38] Bill S-2 Clause 20(5).
[39] Bill S-2 Clause 20(4)(a)-(d), .
[40] Bill S-2 Clause 20(3) (a) to (j) and Clause 21(3)(a) to (g).
[41] Bill S-2 Clause 20(3) (k) to (m), and Clause 23(3)(g) to
[42] Bill S-2 Clause 27.

4. Division of the Value of Matrimonial Interests or Rights

Bill S-2 also provides for the division of the value of MRP interests or rights on the breakdown of a conjugal relationship,[43] or on the death of a spouse.[44] In both circumstances entitlement is determined by a spouse bringing an application either within three years of ceasing to cohabit,[45] or within 10 months of the death of their spouse.[46]

Unfortunately, the language used for dividing interests or rights is extremely complicated. However, the calculation of entitlement depends on whether the applicant is a member of the First Nation on whose reserve the MRP is situated.[47] In particular, Bill S-2 provides that <u>any</u> spouse or survivor is entitled to one half of the value of the interests or rights held in or to the family home as well as, one half of the appreciated value of any rights or interests of assets either acquired during the relationship, or in contemplation of the relationship (excluding gifts or legacies). However, <u>for those rights or interests acquired prior to the relationship and not in contemplation of the relationship</u>, the spouse who is a member of the First Nation on whose reserve the MRP is situated is entitled to the greater of one half of the appreciated value or alternatively, the amount of their contributions towards any improvements for <u>all</u> rights and interests.[48] Whereas, spouses or survivors who are not members of the First Nation on whose reserve the MRP is situated, are only entitled to the net value of payments made toward improvements for land and structures that were acquired by the other spouse prior to the relationship.

In addition to providing one spouse with a valuation owed to them in relation to rights and interests held by the other spouse for on reserve MRP, a court, subject to any land code or First Nation law, can also order the transfer of any interest or right to any structure or land situated on reserve.[49] A court may also make orders:

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[43] Bill S-2 Clause 28 to 33.
[44] Bill S-2 Clause 34 to 40).
[45] Bill S-2 Clause 30(1)
[46] Bill S-2 Clause 36.
[47] Bill S-2 Clauses (28(2) and 28(3); and Clauses 24(2) and 34(3).
[48] Bill S-2 Clauses 28(2)(a)-(c); 28(3)(a)-(c); 34(1); 34(2)(a)-(c); 34(3)(a)-(c).
[49] Bill S-2 Clause 31.

1. restraining the improvident depletion of the interest or right in or to the family home;[50]
2. enforcing a consent agreement regarding the division of MRP that either the partners entered into,[51] or as entered into by a survivor and executor;[52]
3. varying the terms of a trust so that payment may be made to the survivor.[53]

Importantly, while either a spouse or an executor can bring an application to vary the amount of a valuation order,[54, 55] there are no internal provisions within Bill S-2 for challenging the transfer of a right or interest. Another noteworthy provision is that contrary to their fiduciary obligations to their membership, Council for a First Nation may on behalf of a person who is neither First Nation nor an Indian, enforce the order on the reserve as if the order was made in favour of the First Nation.[56]

C. CONCLUSION

Despite the overwhelming opposition to the imposition of provincial family laws on reserve, Bill S-2 mirrors key provisions of provincial family law legislation regarding Emergency Protection Orders, and orders for Exclusive Occupation, and echoes policy considerations influencing the equitable distribution of family property. It also provides for the enforcement of any consent agreements reached between the parties. Essentially, Bill S-2 masks the imposition of provincial family law legislation on reserve, under the guise of providing First Nations with the ability to enact their own laws in this regard.

Arguably, an applicant can continue to rely on the provisions and procedures provided under Bill S-2 in circumstances where a First Nation either fails to enact its own MRP laws, or where First Nation MRP laws fail to provide the same or similar provisions found in Bill S-2. Therefore, any First Nation laws will necessarily be modeled pursuant to the provisions of Bill S-2. Further, these laws will then be applied by the court rather than an on-reserve First Nation tribunal or similar First Nations body. Therefore, Bill S-2 inevitably results in the imposition of provincial family law legislation on reserve.[57]

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[50] Bill S-2 Clauses 32 and 39.
[51] Bill S-2 Clause 33.
[52] Bill S-2 Clause 40.
[53] Bill S-2 Clause 36(4).
[54] Bill S-2 Clause 29.
[55] Bill S-2 Clause 35.
[56] Bill S-2 Clause 52.
[57] Pamela Palmater, *A Brief Overview of Bill S-2: Family Home on Reserve Act*, November 15, 2012, located at: < http://rabble.ca/blogs/bloggers/pamela-palmater/2012/11/brief-overview-bill-s-2-family-homes-reserve-act>.

IV. PRIVATE PROPERTY ON RESERVE

A. OVERVIEW

The proposed *First Nations Property Ownership Act* (the "FNPOA") has garnered much attention in the media as a panacea for the poverty afflicting First Nations reserves. To date, no legislation has been fully drafted, nor has any bill been tabled. Therefore the analysis, is somewhat speculative, based on the proposed content of the FNPOA based on material published mostly by the First Nations Tax Commission.

B. ANALYSIS

Like other legislation such as the *First Nations Land Management Act*, in order for FNPOA to apply, First Nations would have to 'opt-in' with a majority vote of their members. Fee simple title (including mineral rights) would be transferred from the federal government to the First Nation. That First Nation could then allocate parcels of private property to its members or simply hold fee simple title collectively. This would allow the First Nation or band members to sell or lease parcels of land to anyone while retaining jurisdiction over the land.

Proposed key policy elements of FNPOA include:

1. Joint Federal-Provincial Legislation – To assure legal certainty and encourage provincial cooperation, will use mirror federal-provincial legislation following the models of comprehensive claim settlements in BC;

2. Voluntary and Limited to Specific First Nations – Limited to First Nations who want to be included and will be specified by name in FNPOA;

3. Majority Consent of the First Nation Membership without "Surrender" of Land – Majority consent of the members of the First Nation through referendum should be required-no requirement for "surrender" of the land under the *Indian Act*;

4. Title Vested in First Nation Transferable to Individuals: Subject to Referendum – The First Nation should have the power to transfer title to individual members of the First Nation and to allow members of the First Nation to transfer title in fee simple (or some lesser form of interest) to non-members;

5. Expanded Jurisdiction over First Nation Lands – Jurisdiction of First Nations over First Nation Lands should be extended, similar to provisions of the Nisga'a and Tsawwassen Agreements. It should be noted that First Nation Lands remain First Nation Lands, regardless of any change in ownership;

6. Taxation Exemption on First Nation Lands Continues – s.87 of the *Indian Act* continues to apply;

7. Torrens Registry for First Nations Lands – Establishment of a Torrens-style land registry for all First Nation Lands;

8. Expropriation and Escheatment – First Nations should be provided with typical powers of expropriation for public purposes, with fair compensation, and subject to supervision of the Courts. Escheatment should cause land to revert to the First Nation.

9. Solving the "Regulatory" Gap – A combination of First Nation legislation together with provincial law and federal regulation. This will likely involve First Nations "docking-on" to existing provincial systems;

10. Additions to Reserves – While federal/provincial process for converting provincial land to reserve land will remain necessary, land being added to a First Nation reserve can be placed directly under FNPOA as "First Nation Land";

11. Transitional Provisions – Legislation to address transition from the reserve land system. Points to cover include: determining existing rights/ interests/boundaries under current reserve system; guaranteeing existing rights and interests under the *Indian Act*; mediation and dispute resolution regarding existing interests; and converting rights of possession to rights of ownership;

12. Government and Management of First Nations Lands – The private management of First Nation Lands will expand over time, reducing the involvement of the First Nation and federal government in private transactions;

13. Matrimonial Property – Considering whether to include the power to make laws regarding matrimonial real property, including the ability to adopt provincial laws;

14. Regulatory Powers – Can be used to support a Torrens system and can be useful to establish certainty and security in regard to certain matters where reliance on First Nation laws alone may not satisfy the market place i.e. builders liens.

Those opposed to the FNPOA state:

1. the legislation has been developed without broad-based consultation (just the 10 First Nations have expressed support for it);
2. many people already own houses and hold land through Certificates of Possession;
3. banks already provide loans to on reserve members for housing and businesses;
4. private property ownership goes against nature of indigenous peoples' relationship with the land;
5. raises questions about whether treaty and aboriginal rights would continue;
6. many people living on reserve are poor and unemployed—this means they will be ineligible for loans, insurance and mortgages anyway;
7. some First Nations members lack the capacity to manage the responsibly of private property ownership; and
8. the legislation is an attempt to alienate First Nations from their land base and exploit natural resources free from oversight and consultation.

C. CONCLUSION

The FNPOA is strongly opposed by most First Nations leadership. Only 10 out of approximately 610 bands support the initiative. There are a number of legal and practical issues that would need to be addressed before this proposal could move beyond the theoretical stage.

One significant legal issue that would need to be addressed is the nature of the reserve lands and whether they would remain "lands reserved for Indians" within the meaning of section 91(24) of the *Indian Act*. Comprehensive treaty settlements in British Columbia provide that any reserve lands transferred to the First Nation are no longer section 91(24) lands. In addition, the proposal seems to run contrary to the nature of Indian land-holding which is its communal nature.

Until the thorny legal and political issues are worked out, it is unlikely that the FNPOA will be on the government agenda.

V. FIRST NATIONS FINANCIAL TRANSPARENCY ACT

A. OVERVIEW

On March 27, 2013, the *First Nations Financial Transparency Act* (the "Act") was passed into law. The Act is meant to enhance the financial accountability and transparency of First Nations governments by requiring the preparation and publication of audited consolidated financial statements and of schedules of remuneration and expenses reimbursed to members of Chief and Council.[58] The Act defines "remuneration" as salaries, wages, commissions, bonuses, fees, honoraria as well as monetary and non-monetary benefits[59] while "expenses" include the costs of transportation, accommodation, meals, hospitality, and incidental expenses.[60]

The Act requires that consolidated financial statements and schedules of remuneration and expenses are reviewed by an auditor in accordance with generally accepted accounting principles each year.[61] These documents must then be published by First Nations governments on the internet as well as on the website of Aboriginal Affairs and Northern Development Canada within 120 of each fiscal year end.[62] This information must remain publically available for at least 10 years.[63] Moreover, copies of these documents must also be made available to First Nations members upon request.[64]

First Nations that fail to publish or provide copies of consolidated financial statements and schedules of remuneration and expenses may be ordered by a superior court to produce them.[65] Further, the Minister of Aboriginal Affairs and Northern Development Canada may withhold funding and terminate contribution agreements with First Nations in breach of the Act.[66]

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[58] Section 3.
[59] Section 2.
[60] *Ibid.*
[61] Section 5 and 6.
[62] Sections 8 and 9.
[63] Section 8(2).
[64] Section 7.
[65] Sections 10 and 11.
[66] Section 13.

B. ANALYSIS

While First Nations governments would agree that accountability and transparency of elected officials is of utmost importance, the passage of the Act may have more political than practical effects. The Act follows a similar piece of failed legislation proposed MP Kelly block in 2010.[67] That private members' bill coincided with a report published by the Canadian Taxpayers Federation ("CTF") claiming that 160 First Nations leaders earned more than provincial premiers, and 50 paid more than the prime minister.[68] CTF also alleged that over 600 First Nations officials received an income that is equivalent to $100,000 off reserve.[69]

The Assembly of First Nations ("AFN") pointed out serious issues with CTF's methodology, noting that their calculations included travel expenses and per diems. Based on AFN's recalculations, First Nations officials were paid an average of $36,845 per year.[70] AFN found that 3%, of chiefs and councillors earned over $100,000, less than 1% more than their provincial premiers, and none more than the prime minister.[71] AFN also suggested that CTF's use of 'taxable equivalents' provided a basis for inflating salaries and supporting the appearance of exorbitant income. Further, the use of the term 'taxable equivalent' overlooks the fact that not all band council members are status Indians and does not acknowledge the historical and constitutional basis for such taxation arrangements.

Practically speaking, the Act is not likely the answer to the transparency and accountability in First Nations governance. In all likelihood, the Act will simply add to the tremendous reporting burdens currently experienced by First Nations. Indeed, First Nations are already required to submit at least 168 reports on federal government programs annually.[72] In 2002, Auditor General Shelia Fraser noted an existing overlap in the requirement for externally audited financial statements, finding that five separate audits can be required from each community.[73] She called for this number to be reduced, stating that "[r]esources used to meet

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[67] Private Member Bill C-575, introduced by MP Kelly Block.
[68] Canadian Taxpayers Federation, "New Jaw-Dropping Reserve Pay Numbers" (November 21, 2010) accessed online at: http://taxpayer.com/federal/new-jaw-dropping-reserve-pay-numbers on November 29, 2011.
[69] *Ibid.*
[70] Assembly of First Nations, "The Straight Goods on First Nations Salaries" (November 2010) accessed online at: http://www.afn.ca/uploads/files/accountability/5_-_the_straight_goods_on_first_nation_salaries.pdf, on November 28th, 2011 at p. 3 ("AFN"). Note that calculations were based on salary and honourariums.
[71] AFN at p. 4.
[72] Report of the Auditor General of Canada to the House of Commons, "Chapter 1: Streamlining First Nations Reporting to Federal Organizations" (December 2002) accessed online at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200212_01_e_12395.html on November 29, 2011 ("Auditor's report").
[73] *Ibid*., at para. 1.79.

these reporting requirements could be better used to provide direct support to the community."[74] In fact, the Act does little to address the capacity building required to facilitate best practices of First Nations governments. Financial statements alone do not provide a meaningful measure of performance, nor are they a fair reflection of community priorities.

Further, the inclusion of "expenses" in the reporting requirements has the potential to be inflammatory and misleading. As part of ongoing reconciliation efforts, many First Nations are engaged in a variety of activities like treaty making and the settlement of claims based on their Treaty and Aboriginal rights. They are also involved in significant negotiation and consultation with industry over development occurring in their territories. All of these activities necessitate travel and associated expenditures, which can be particularly costly for remote communities.[75] Meaningful engagement of First Nations provides important social and economic benefits directly to First Nations communities, as well as to all Canadians. The inclusion of these expenses, therefore, may be likely to lead to unfair conclusions and scrutiny of First Nations officials.

C. CONCLUSION

It appears that while the federal government is demanding accountability and transparency of First Nations, other public sector institutions are not being held to the same standard. In Quebec, public sector salaries are considered personal information, making their disclosure illegal.[76] In Ontario, the government posts the names of all public-sector employees who earn over $100,000 a year or more on a dedicated website. This includes the salaries of employees from municipalities, hospitals, universities, school boards and public-sector ventures. In British Columbia, the *Financial Information Act* requires provincial and municipal government agencies to disclose the total remuneration of anyone earning more than $75,000 a year. Similarly, the *Public Sector Employers Act* mandates disclosure of all compensation provided to Chief Executive Officers and the next four highest ranking executives in public sector organizations.

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[74] *Ibid*., at para. 1.3.
[75] The majority of First Nations communities are fewer than 500 residents, many in remote areas, which affect both service delivery and operating expenses. See Auditor's report at para 1.11.
[76] Kevin Dougherty, "Public Salaries not so Public" (Montreal Gazette: February 7, 2011) accessed online at http://www.montrealgazette.com/life/Public+salaries+public/4233811/story.html on November 29, 2011.

In contrast to public disclosure requirements of other government officials in Canada, the Act requires more stringent reporting than is required by most provincial governments. While most provinces have instituted public sector salary disclosure to varying degrees, the information is generally limited to total salaries, bonuses, and benefits packages. Under the Act, First Nations officials must disclose more, including travel and incidental expenses associated with the performance of job-related duties. Further, the consolidated financial statements and schedules of remuneration, allow for a far more detailed inspection of expenses the figures released under provincial legislation.