

# **RECENT LEGISLATIVE DEVELOPMENTS**

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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. This paper examines four of these legislative changes.

## 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. Recent amendments to the *Indian Act* have arguably streamlined the process but have also 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.<sup>1</sup>

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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<sup>1</sup> *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*.<sup>2</sup> 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.<sup>3</sup> 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 at any particular time.

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<sup>2</sup> *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203.

<sup>3</sup> *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 Minister 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 for a simpler designation 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.

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 will be used 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 flies in the face centuries of government practice (eg. that surrenders/designations are made to Her Majesty or Her Majesty's designate).

One may expect that there may be 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 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 C-428 AN ACT TO AMEND THE INDIAN ACT

#### A. OVERVIEW

Bill C-428 was a private member's bill brought forward by Rob Clarke, the Member of Parliament from Denethé-Mississippi-Churchill River. Bill C-428 was passed into law as the *Indian Act Amendment and Replacement Act* ("IAARA") and assented to on December 16, 2014.

The preamble to the *IAARA* sets out that the *Indian Act*<sup>4</sup> is an outdated colonial statute which results in First Nations being subjected to differential treatment; and that the *Indian Act* does not provide an adequate legislative framework for prosperous and self-sufficient First Nations' communities. Ultimately, the Government of Canada is committed to developing new legislation to replace the *Indian Act*.<sup>5</sup>

Pursuant to the provisions of the *IAARA*, the Minister of Indian Affairs and Northern Development is to provide an annual report to the House of Commons on the work undertaken to develop legislation to replace the *Indian Act*.<sup>6</sup>

Much of Bill C-428 did not find its way into legislation. However, two significant *IAARA* amendments to the *Indian Act* include:

1. Removal of the Minister's ability to disallow Section 81 by-laws;<sup>7</sup>
2. Adding a requirement for Band Councils to publish by-laws.<sup>8</sup>

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<sup>4</sup> *Indian Act* (R.S. C. 1985, c. 1-5).

<sup>5</sup> *Indian Act Amendment and Replacement Act*, S.C. 2014, c. 38, Preamble.

<sup>6</sup> *Indian Act Amendment and Replacement Act*, S.C. 2014, c. 38, section 2.

<sup>7</sup> *Indian Act* (1985 c. I-5) section 82(1) and (2) which previously required council of the Band to forward a copy of every by-law to the Minister within four days after it was made, and for the Minister to disallow a by-law within a forty day period are now repealed.

<sup>8</sup> *Indian Act* (1985 c. I-5) section 86 previously did not require publication of by-laws. Instead, certification by the superintendent that the by-law was a true copy was evidence that the by-law was truly made.

## B. ANALYSIS

### 1. Removal of the Requirement to Obtain Ministerial Approval of Section 81 By-laws

The recent amendments remove the requirement for First Nations to obtain the Minister's approval to pass by-laws under section 81 of the *Indian Act*. This amendment provides First Nation governing bodies with greater autonomy over the regulation of activities on reserve lands. Related amendments to other provisions of the *Indian Act* result in fines imposed under these by-laws belonging to the band, rather than the Crown<sup>9</sup>. Other amendments to the *Indian Act* allow peace officers and other authorized individuals to seize goods and chattels on reasonable grounds that an individual has contravened a by-law. That is, a conviction is no longer required before goods and chattels may be seized.<sup>10</sup>

Section 81 of the *Indian Act* has always authorized band councils to impose their own by-laws governing activities and conduct occurring on reserve. While the word by-law suggests municipal-like powers the range of authority vested to band councils through section 81 includes provincial-like powers as well. For instance, band councils may make by-laws providing for a range of circumstances including:

- (a) the health of reserve residents and the prevention of disease;<sup>11</sup>
- (b) the observance of law and order;<sup>12</sup> and
- (c) the prevention of disorderly conduct and nuisances.<sup>13</sup>

Previously, a band council's ability to enact a by-law to address undesirable situations or conduct occurring on reserve was limited by the Minister's ability to disallow any proposed by-law. The Minister often denied approval for by-laws that did not conform to colonial perspectives or disallowed by-laws that contemplated governance of law and order on reserves (e.g. by-laws that included banishment provisions).

The amendments to the *Indian Act* removes the disallowance and oversight powers of the Minister that previously existed under section 82 of the *Act*. This amendment empowers band councils to exercise the full-extent of their section 81 by-law making powers, and

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<sup>9</sup> *Indian Act* (1985 c. I-5) section 104 (3) states:

(3) If a fine is imposed under a by-law by the council of a band under this Act, it belongs to the band and subsections (1) and (2) do not apply.

<sup>10</sup> *Indian Act* (1985 c. I-5) section 103.

<sup>11</sup> *Indian Act* (1985 c. I-5) section 81(1)(a).

<sup>12</sup> *Indian Act* (1985 c. I-5) section 81(1)(c).

<sup>13</sup> *Indian Act* (1985 c. I-5) section 81(1)(d).



moves them closer towards true self-governance of reserves. Specifically, Section 81 confers no less than 22 purposes for which band councils have legislative authority over reserves.

Band councils now possess the ability to make laws which may or may not be rooted in customary practice. This is particularly important for law and order and residency by-laws, both of which may regulate circumstances when certain individuals will be prevented from attending on reserve, residing on reserve, or otherwise remaining on reserve. While the authority to enact these by-laws is not new, the removal of Ministerial oversight means that Band councils no longer need to construct by-laws based on what the Minister may accept. While Section 81 has always provided the same range of purposes for Band councils to enact by-laws, the Minister acted as gate-keeper effectively limiting the band councils from exercising the full-extent of their legislative authority.

However, months after the Section 81 amendments the issue has shifted from the ability to enact by-laws to the issue of having police agencies act to enforce band council by-laws. For instance, there is considerable variability from jurisdiction to jurisdiction as to whether or not police agencies (other than a band by-law officers or on-reserve police) will take steps to enforce by-laws that contemplate quasi-criminal sanctions such as removal from reserve, banishment, or arrests.

In our experience the RCMP will conduct their own internal review of a by-law and then consult with the Minister's office to determine if both departments agree to the enforcement provisions of the by-law. The RCMP will not make arrests based on an individual contravening a Section 81 by-law. They will however, consider executing an arrest warrant in circumstances contemplated by Section 81(2) of the *Indian Act*. That is, where a by-law is contravened and a conviction entered and where a court has made an order prohibiting the continuation or repetition of an offence by the person convicted.

Thus, while the removal of Ministerial oversight regarding the enactment of Section 81 by-laws is certainly a step in the right direction, without the ability to enforce culturally appropriate by-laws it seems that little if any real progress towards self-governance over reserve lands has been gained.

## 2. Requirement to Publish By-Laws

Amendments to s.86 of the *Indian Act* require band councils to publish copies of by-laws on an Internet site, in the *First Nations Gazette* or in a newspaper circulated on the reserve.<sup>14</sup> The council of a band is also required to provide copies of a by-law on request.<sup>15</sup> By-laws come into force either on the day they are first published or on a later date specified in the by-law.<sup>16</sup>

Historically, obtaining information regarding the status of band by-laws was a tedious exercise. Many First Nations neither had the resources nor the capacity to accurately catalogue and maintain by-law records, and copies of existing by-laws were not always readily available. Therefore the bands themselves were not always informed of all historic by-laws that remained in force over their reserve lands.

Requiring bands to publish by-laws and to maintain access to by-laws published on an Internet site for the period for which it is in force will assist with general access of this information and thereby will assist with regulating activities on reserve.

## C. CONCLUSION

The *IAARA* contemplates a long-term piece-meal strategy to replace the *Indian Act* provision-by-provision and year-by-year. Rather than employ the usual method of debating and replacing either the entire *Indian Act* or whole sections of that *Act*, the *IAARA* contemplates a fractured process of incremental change. While some may see this process as efficient, a more cynical perspective might suggest that the federal government rarely approaches any changes, particularly changes to historic legislation, without a long-term comprehensive strategy. The potential danger associated with annual piece-meal amendments to the *Indian Act*, even ones that address First Nation concerns with respect to specific provisions, is that this process denies First Nations the opportunity to analyze the government's overarching strategy or consider pending changes to the *Indian Act* in a holistic context. Alternatively, full-scale replacement of the entire *Indian Act* or substantial portions of this *Act* would require years of internal debate and analysis among First Nation communities, with no guarantees that consensus would ever be reached.

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<sup>14</sup> *Indian Act* (1985 c. I-5) section 86(1).

<sup>15</sup> *Indian Act* (1985 c. I-5) section 86(2).

<sup>16</sup> *Indian Act* (1985 c. I-5) section 86(4).

The removal of Ministerial oversight of section 81 by-laws certainly moves Band councils a step closer to self-governance over reserves. A further step is to find a way by which provincial or federal police enforcement agencies such as the RCMP will proceed with arrests of individuals who contravene Band council by-laws. The authority to make or create law and order, residency, and trespass by-laws without the willingness of police agencies to enforce them, encumbers a Band council's ability to effect any real change to improve living conditions on reserve.

The amendment requiring publication of Band council by-laws informs both First Nation members and the public as a whole as to regulated conduct on reserve. However, unless the First Nation has the ability to enforce the by-law provisions, compliance becomes a voluntary exercise.

## ***IV. 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 address division of property on marriage breakdown or the death of a spouse.

#### 1. Context

In *Derrickson*, the Supreme Court of Canada was faced with the issue of equitably dividing property in a divorce proceeding.<sup>17</sup> 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.<sup>18</sup> 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

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<sup>17</sup> *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285

<sup>18</sup> *Derrickson* at para. 43

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 the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the “*Family Homes Act*”)

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’. The *Family Homes Act* attempts to remedy this “legislative gap”.<sup>19</sup> In 2006/2007 there was extensive consultation regarding Bill S-2 (which subsequently became the *Family Homes Act*). This 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.<sup>20</sup> Importantly, the participants overwhelmingly rejected any application of provincial laws.<sup>21</sup>

B. ELEMENTS OF THE ACT

The stated purposes of the *Family Homes Act* are two-fold:

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

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<sup>19</sup> 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

<sup>20</sup> 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

<sup>21</sup> 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.

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.<sup>22</sup>

The *Family Homes Act* only applies when at least one of the spouses or common-law partners (collectively “Spouses”) is a First Nation member or an Indian.<sup>23</sup> While it does not affect title,<sup>24</sup> the *Family Homes Act* does enable the transfer of rights to an interest in reserve land to a non-First Nation spouse or survivor.<sup>25</sup>

1. Enabling First Nations to pass matrimonial real property laws

The *Family Homes Act* 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.<sup>26</sup> Once an MRP law comes into force, judicial notice of the law is taken in any proceedings.<sup>27</sup>

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, the *Family Homes Act* provides provisional rules and procedures relating to the occupation, use, possession and division of MRP. In particular, this *Family Homes Act* addresses general occupation of a family home, Exclusive Occupation Orders and Emergency Protection Orders.<sup>28</sup> It also includes provisions for the division of matrimonial interests or rights on the breakdown of a conjugal relationship,<sup>29</sup> or upon the death of a Spouse.<sup>30</sup>

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<sup>22</sup> *Family Homes on Reserve and Matrimonial Interests or Rights Act* (“*Family Homes Act*”) Section 4

<sup>23</sup> *Family Homes Act*, Section 6

<sup>24</sup> *Family Homes Act*, Section 5

<sup>25</sup> *Family Homes Act*, Section 31

<sup>26</sup> *Family Homes Act*, Section 7(1)

<sup>27</sup> *Family Homes Act*, Section 11(1).

<sup>28</sup> *Family Homes Act*, Sections 16(1) to 20(7).

<sup>29</sup> *Family Homes Act*, Sections 28 to 33.

<sup>30</sup> *Family Homes Act*, Sections 34 to 40.

### 3. General Occupation & Exclusive Occupation Orders

Under the *Family Homes Act* a spouse may generally occupy the family home regardless of whether or not they are a First Nation member or an Indian. 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.<sup>31</sup>

The intent of the provision allowing a survivor to occupy the family home for 180 days after the death of their spouse is to provide some stability to surviving spouses (particularly surviving spouses with young children). However, the effect of provision is that it may delay the distribution of estate assets to First Nation member beneficiaries. Specifically, a non-First Nation survivor may prevent or delay distribution of estate assets to First Nation member beneficiaries, even in circumstances where the subject property was acquired prior to the conjugal relationship commencing. In addition to the right to occupy the family home for 180 days, the survivor is also provided with a 10-month time frame to bring an application claiming an interest in the MRP.<sup>32</sup> In turn, an executor must not proceed with distribution of the estate unless the survivor consents in writing to the proposed distribution or upon expiry of the 10-month application period and any extended application period.<sup>33</sup>

Different from general occupancy, the *Family Homes Act* also allows a court to 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 Indian.<sup>34</sup> 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.<sup>35</sup>

### 4. 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

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<sup>31</sup> *Family Homes Act*, Section 14.

<sup>32</sup> *Family Homes Act*, Section 36(1).

<sup>33</sup> *Family Homes Act*, Section 38(1).

<sup>34</sup> *Family Homes Act*, Section 20(1), and Clause 21(1).

<sup>35</sup> *Family Homes Act*, Section 20(4)(a)-(d).

occupation of the family home and removal of the other spouse or any person who habitually resides at the family home (“Emergency Protection Order”).<sup>36,37</sup> Similar to the new British Columbia legislation governing family law,<sup>38</sup> “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.<sup>39</sup> 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.

Importantly, neither an Emergency Protection Order nor an order for Exclusive Occupation, changes who holds an interest or right in the family home.

## 5. Division of the Value of Matrimonial Interests or Rights

The heart of the *Family Homes Act* is to provide for the division of the value of MRP interests or rights on the breakdown of a conjugal relationship,<sup>40</sup> or on the death of a spouse.<sup>41</sup> In both circumstances entitlement is determined by a spouse bringing an application either within three years of ceasing to cohabit,<sup>42</sup> or within 10 months of the death of their spouse.<sup>43</sup>

Importantly, a spouse that holds the interest or right to the family home is required to obtain the written consent of the other spouse prior to disposing or encumbering their rights or interest in the family home.<sup>44</sup>

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.<sup>45</sup> In particular, any spouse 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

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<sup>36</sup> *Family Homes Act*, Section 16(1).

<sup>37</sup> *Family Homes Act*, Section 16(5).

<sup>38</sup> *Family Law Act*, S.B.C. 2011, Chapter 25 at Part 1

<sup>39</sup> *Family Homes Act*, Section 16(9)(a) to (f).

<sup>40</sup> *Family Homes Act*, Section 28 to 33.

<sup>41</sup> *Family Homes Act*, Section 34 to 40.

<sup>42</sup> *Family Homes Act*, Section 30(1).

<sup>43</sup> *Family Homes Act*, Section 36.

<sup>44</sup> *Family Homes Act*, Section 15(1)

<sup>45</sup> *Family Homes Act*, Sections 28(2) and 28(3); and Sections 34(2) and 34(3).

acquired during the relationship, or in contemplation of the relationship (excluding gifts or legacies). However, for those rights or interests acquired prior to the relationship and not in contemplation of the relationship, 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 all rights and interests.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> A court may also make orders:

1. restraining the improvident depletion of the interest or right in or to the family home;<sup>49</sup>
2. enforcing a consent agreement regarding the division of MRP that either the partners entered into,<sup>50</sup> or as entered into by a survivor and executor;<sup>51</sup>
3. varying the terms of a trust so that payment may be made to the survivor.<sup>52</sup>

Importantly, while either a spouse or an executor can bring an application to vary the amount of a valuation order,<sup>53,54</sup> there are no internal provisions within the *Family Homes Act* 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.<sup>55</sup> That is, on application of a spouse, a court may by order determine each spouse's entitlement and the amount payable to them with respect to their one-half interest or

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<sup>46</sup> *Family Homes Act*, Section 28(2)(a)-(c); 34(1); 34(2)(a)-(c)).

<sup>47</sup> *Family Homes Act*, Section 28(3)(a)-(c), and 34(3)(a)-(c).

<sup>48</sup> *Family Homes Act*, Section 31.

<sup>49</sup> *Family Homes Act*, Section 32 and 39.

<sup>50</sup> *Family Homes Act*, Section 33.

<sup>51</sup> *Family Homes Act*, Section 40.

<sup>52</sup> *Family Homes Act*, Section 36(4).

<sup>53</sup> *Family Homes Act*, Section 29.

<sup>54</sup> *Family Homes Act*, Section 35.

<sup>55</sup> *Family Homes Act*, Section 52.



right to the family home,<sup>56</sup> or in the case of a spouse who is a First Nation member, a court may transfer an interest or right held in any structure or land held on reserve.<sup>57</sup> In turn, the spouse in whose favour a court order is made, may apply to council to enforce the order on reserve.<sup>58</sup>

## C. CONCLUSION

Despite the overwhelming opposition to the imposition of provincial family laws on reserve, the *Family Homes Act* 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, the *Family Homes Act* 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 the *Family Homes Act* 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 under the *Family Homes Act*. Therefore, any First Nation laws will necessarily be modeled pursuant to the provisions of the *Family Homes Act*. Further, these laws will then be applied by the court rather than an on-reserve First Nation tribunal or similar First Nations body. Ultimately, the *Family Homes Act* inevitably results in the imposition of provincial family law legislation on reserve.<sup>59</sup>

## V. ELECTION CODES

### A. OVERVIEW

Until recently, First Nations could utilize one of three processes for the selection of Band councils:

1. the provisions of the *Indian Act* and the *Indian Band Election Regulations*<sup>60</sup>;

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<sup>56</sup> *Family Homes Act*, Section 29;

<sup>57</sup> *Family Homes Act*, Section 31(1).

<sup>58</sup> *Family Homes Act*, Section 52.

<sup>59</sup> 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>>.

<sup>60</sup> *Indian Band Election Regulations*, C.R.C. 1978, c. 952 as am.

2. the processes provided through a custom election code; or
3. the procedures set out in the community constitution contained in a self-government agreement.<sup>61</sup>

A small majority (55%) of Canada's 617 First Nations select their leadership based on custom election codes.<sup>62</sup> While some of these custom electoral laws make only minor changes to the *Indian Act* system, other custom selection processes have provisions for representatives chosen from family groupings.<sup>63</sup> Of the remaining 274 First Nations, a majority hold elections using the *Indian Act* and accompanying *Indian Band Election Regulations*, while a small minority are self-governing.<sup>64</sup>

In addition to the above-noted leadership selection processes, a fourth option is now provided under the *First Nations Elections Act*.<sup>65</sup> This *Act* and accompanying *First Nation Elections Regulations*<sup>66</sup> came into force on April 2, 2015.<sup>67</sup>

## B. ANALYSIS

Under the provisions of the *Indian Act* the Minister of Aboriginal Affairs and Northern Development Canada ("AANDC") or the Governor in Council may make orders and regulations regarding:

1. the meeting to nominate candidates;
2. the appointment and duties of electoral officers;
3. the manner in which voting is carried out;
4. election appeals; and
5. the definition of residence for the purpose of determining the eligibility of voters.<sup>68</sup>

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<sup>61</sup> Aboriginal Affairs and Northern Development Canada, *Fact Sheet – Understanding First Nation Elections*, located online at: < <http://www.aadnc-aandc.gc.ca/eng/1323193986817/1323194199466>>.

<sup>62</sup> Aboriginal Affairs and Northern Development Canada, *Fact Sheet – Understanding First Nation Elections*, located online at: < <http://www.aadnc-aandc.gc.ca/eng/1323193986817/1323194199466>> states: Currently, of the 617 First Nations in Canada, 238 holds elections under the *Indian Act* and the *Indian Band Election Regulations*, 343 select their leadership according to their own community or custom election codes and 36 are self-governing.

<sup>63</sup> Shin Imai, *The 2013 Annotated Indian Act and Aboriginal Constitutional Provisions* (United States, Thomson Reuters, 2013) at p. 18.

<sup>64</sup> Aboriginal Affairs and Northern Development Canada, *Fact Sheet – Understanding First Nation Elections*, located online at: < <http://www.aadnc-aandc.gc.ca/eng/1323193986817/1323194199466>> ,

<sup>65</sup> *First Nations Elections Act*, S.C. 2014, c.5

<sup>66</sup> *First Nations Elections Regulations*, SOR/2015/86.

<sup>67</sup> *First Nations Elections Act*, S.C. 2014, c. 5, Section 44.

<sup>68</sup> *Indian Act*, R.S.C. 1985 c. I-5, Section 76(1).

The *Indian Act* also provides the authority for the Minister to set aside an election upon being satisfied that: corruption related to the election occurred; that a contravention of the *Indian Act* affected the results of the election; or that an ineligible person was nominated as a candidate.<sup>69</sup>

In contrast to First Nations that select their Band councils under the *Indian Act* (“Indian Act Bands”) the Minister and/or the AANDC is not involved in election processes using custom election codes (“Custom Elections”) or Self-governing First Nations. Instead for Custom Elections and Self-governing First Nations, AANDC’s role is limited to recording the election results provided by the First Nation.<sup>70</sup>

The newly enacted *First Nations Elections Act* (the “FNEA”) is essentially a hybrid between the *Indian Act* selection provisions and Custom Elections. That is, the *FNEA* and accompanying regulations provide a complete election code without the same level of Ministerial approval and/or oversight that occurs with *Indian Act Bands*. Importantly, the *FNEA* does not set aside or change the *Indian Act* election system.<sup>71</sup>

Under the *FNEA* Chief and Council are not required to obtain Ministerial approval to appoint electoral officers<sup>72</sup> and applications contesting the validity of an election are made to either the Federal Court or the superior court of a province in which the First Nation’s reserves are located.<sup>73</sup> Although the Governor in Council retains the ability to make regulations with respect to elections, under the *FNEA* the Governor in Council is not provided with the authority to set aside an election.<sup>74</sup>

The *FNEA* also provides additional stability in that band councils are elected for a four-year term as opposed to the two-year term as contemplated under the *Indian Act*.

Different from the *Indian Act* and accompanying *Indian Band Election Regulations*, the *FNEA* provides detailed provisions with respect to: voting eligibility, candidacy; nomination; possessing and selling ballots; attempting to influence votes; appropriate conduct at a polling

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<sup>69</sup> *Indian Act*, R.S.C. 1985 c. I-5, Section 79.

<sup>70</sup> Aboriginal Affairs and Northern Development Canada, *Fact Sheet – Understanding First Nation Elections*, located online at: < <http://www.aadnc-aandc.gc.ca/eng/1323193986817/1323194199466>>.

<sup>71</sup> Aboriginal Affairs and Northern Development Canada, *First Nations Elections Act*, accessed online at: < <http://www.aadnc-aandc.gc.ca/eng/1323195944486/1323196005595>>.

<sup>72</sup> *First Nation Election Regulations*, SOR/2015/86, Section 2 compared to *First Nations Elections Act*, S.C. 2014 c.5, Section 2 in conjunction with *Indian Band Election Regulations*, Section 2 “electoral officer”.

<sup>73</sup> *First Nations Elections Act*, S.C. 2014, Sections 30 – 35.

<sup>74</sup> *First Nations Elections Act*, S.C. 2014, Section 40.

stations; by-election procedures; contesting the results of an election; petitioning for the removal from office; and penalties for contravening the *FNEA*. In addition, the supporting *First Nations Elections Regulations* sets out the time-frames under which different components of the election are to occur; the content of various election related documents; as well as the details as to how specific steps within the election process are to be executed.

Ultimately, the *FNEA* provides the framework for a comprehensive election code that is easily adopted by a First Nation. The Minister may add the name of a First Nation to the Schedule of Participating First Nations upon the request of a band council supported by a band council resolution.<sup>75</sup> Alternatively, the Minister has the discretion to add a First Nation to the Schedule of Participating First Nations in circumstances when a protracted leadership dispute has significantly compromised governance, or where the Governor in Council has set aside an election of that First Nation under s.79 of the *Indian Act*.<sup>76</sup>

### C. CONCLUSION

Custom election codes can be expensive and time-consuming to develop, and difficult to implement under the current *Indian Act* regime. Ultimately, the *FNEA* provides a comprehensive election framework that improves upon the *Indian Act* system.

The federal government's intentions behind the *FNEA* are consistent with recent amendments to the land designation provisions effected by Bill C-45 and the *Indian Act* amendments provided under Bill C-428.

While many current *Indian Act Bands* may prefer a custom selection process, they can be expensive, time-consuming to develop, and difficult to implement under the current *Indian Act* regime. Ultimately, the *FNEA* provides a comprehensive election framework that improves on the *Indian Act* system.

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<sup>75</sup> *First Nations Elections Act*, S.C. 2014, Section 3(1)(a);

<sup>76</sup> *First Nations Elections Act*, S.C. 2014, Section 3(1)(b) & (c).