Assembly of First Nations
Special Chiefs Assembly

December 9-11, 2014
Winnipeg, Manitoba

Assemblée des Premières Nations
Assemblée extraordinaire des Chefs

Du 9 au 11 décembre 2014
Winnipeg (Manitoba)

Matrimonial Property Rights
Outline

1. Background
2. Understanding the Act
3. Potential Legal Challenges
4. Next steps
Background

The “Legislative Gap”?

1. Division of Powers: provincial / territorial laws cannot be used to change interests in real property on reserves.

2. While the federal government has jurisdiction under s. 91(24), there was no federal legislation dealing with matrimonial real property (MRP) issues.

3. The jurisdiction of First Nations respecting MRP was not recognized by the federal government.
Fed Govt Cleaning up its own Mess

Professor Larry Chartrand writes:

“The result of colonial policies that oppressed/marginalized Indigenous legal institutions (including how family property was managed) and concurrently devalued women’s legal status and authority did not produce a gap in the law of matrimonial real property but rather produced a kind of colonial inflicted Indigenous institutional paralysis.

There is no gap. The Act tries to remove a degree of colonial oppression caused by the Feds in the first place.”
Family Homes on Reserves and Matrimonial Interests or Rights Act (“Act”)

June 19, 2013: Act received Royal Assent (preamble, ss. 53 – 56).

December 16, 2013: Governor in Council declared sections 1 to 11 and 53 of the Act in force.

December 16, 2014: Provisional rules come into force (ss. 12 to 52).
What does the Act do?

- Divides interest in real property situated on reserve upon breakdown of conjugal relationship with respect to 2 major issues:
  - Use, possession and occupation of family homes on reserve.
  - Division of value of any interests that they hold in structures and lands on reserve.
The Act has two main parts

1) Provisional Federal Rules
   (Effective Dec 16/14)

   Provides laws for dealing with matrimonial real property until First Nation passes its own MRP laws.

   Many sections but will look more closely at:
   a) Emergency Protection Orders
   b) Exclusive Occupation Orders

2) First Nation Law-Making Mechanism
   (took effect Dec 16/13)

   First Nation submits proposed law to members for approval.

   Proper notice to members for voting.

   At least 25% of members must vote.

   Law approved if majority achieved.
Who does the Act apply to?

• The Act applies to married couples and common-law partners living on-reserve, where at least one of them is a First Nation member or an Indian. The exceptions are:
  – First Nations that have enacted MRP laws under this Act before December 16, 2014
  – First Nations with a self-government agreement (unless they have reserve land and opt into the provisional federal rules).
  – First Nations with land codes in place under the First Nations Land Management Act
  – First Nations without land codes in place that are on the schedule to the First Nations Land Management Act will be exempted for a period of three years form the date of Royal Assent—that is, until June 19, 2016
1. Provisional Federal Rules

a) Emergency Protection Orders

What is an EPO?
- A court order to allow exclusive occupation of the family home for up to 90 days.

Who can issue such an order?
- A designated judge.

When can this judge make such an order?
- When the judge deems that family violence or damage to the property is a real possibility.

Who can make the application?
- A spouse or common-law partner; or
- A peace officer or other person with or without the consent of the spouse or common-law partner.
1. Provisional Federal Rules

a) Emergency Protection Orders - Issues/Challenges:

*not a complete list

1. No requirement to notify the First Nation at this stage.
2. Access to justice issues for First Nation citizens who cannot afford to have legal representation.
3. Access to Legal Aid in each province is different (i.e. some Legal Aid offices will not assist unless children are involved).
4. May cause even more reliance on peace officers to determine when to seek EPO and might even delay process.
5. Concerns for access to justice where there are no peace officers available to enforce orders.
1. Provisional Federal Rules

b) Exclusive Occupation Orders

• **What is an Exclusive Occupation Order?**
  – A court order to allow exclusive occupation of and access to the family home.

• **Who can issue such an order?**
  – A judge referred to in s. 2(1) of the Divorce Act.

• **When can this judge make such an order?**
  – Following the death of a spouse
  – Following the break-up of a conjugal relationship
  – For removal of disruptive person(s)

• **How long can an Exclusive Occupation order be granted for?**
  – The duration could range from a set number of days to a longer period, e.g. until dependent children reach the age of majority.
1. Provisional Federal Rules

b) Exclusive Occupation Orders Issues/Challenges:

• Loss of opportunity for heirs to enjoy the full benefits of their property when an Exclusive Occupation Order has been granted.
• Requirement of spousal consent for the sale or disposition of the family home.
• Access to justice issues for individuals who cannot afford legal representation.
• Possible discrimination complaints.
2. First Nation Law-Making

• The content and acceptability of any law is determined between a First Nation government and its members.

• The First Nation Law cannot be disallowed, altered, or cancelled by the Minister or any government official.

• First Nations may enact their community-specific laws at any time, however, the Provisional Federal Rules will apply until the First Nation enacts its own law.
Potential Legal Challenges?

- Division of powers
- Discrimination
- Section 35
AFN Position

• The consultation process was inadequate.
• The Act does not address the important underlying issues regarding housing, access to justice, and violence on reserve.
• The Act is not suited to address the diverse needs of First Nations across Canada.
• Provincial courts do not have the needed knowledge nor capacity to make determinations about real property on reserves.
• Necessary supports have not been provided for First Nations to engage in lawmaking or exercise jurisdiction in this area.
Next Steps

• AFN wrote Ministers of Justice, AANDC and Public Safety to delay application of provisional rules until critical issues have been resolved.
  • No response has been received to-date.
  • First Nations may proactively resist implementation of provisional rules.

• Legal opinion regarding the possibility of a Charter challenge (Resolution 32-2014).