Federal Bill C-8 Legislates Matrimonial Property Rights on First Nations Reserves

Bill C-8, *An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*,[1] was introduced in the House of Commons on February 2, 2009, and is currently being debated at second reading. The proposed legislation would give First Nations authority to enact laws related to the interests and rights of spouses and common-law partners in family real property. In the interim, federal provisional rules would apply until a First Nation has its own laws in force.[2]

The division of powers set out in the *Constitution Act, 1867*, authorizes the provinces to legislate in respect of private property and the federal Parliament to legislate in respect of First Nations' reserve lands.[3] Applying this division of jurisdiction in the 1986 decision *Derrickson v Derrickson*, the Supreme Court of Canada found that the provisions of British Columbia's *Family Relation's Act* could not be applied pursuant to a divorce to determine the division of matrimonial real property on Aboriginal reserves because the matter falls under federal jurisdiction.[4] Bill C-8 is the second parliamentary attempt to fill this legislative gap.[5]

Aboriginal communities throughout Canada have expressed various concerns over the bill. A press release from the Native Women's Association of Canada (NWAC) and the Assembly of First Nations (AFN) states that "[a]ll Bill C-8 does is force families into provincial courts. This is not a solution. For many families it's unaffordable and it will also force families in remote communities to endure long waiting periods before their case can be heard."[6] Furthermore, it is claimed that the bill "ignores community-based approaches already developed by many First Nations to deal with matrimonial reservation property."[7]

Constitutional objections to the bill are based upon a perceived failure of the federal government to adequately consult First Nations peoples during the drafting of the bill. The Nishnawbe Ask Nation of James Bay, Ontario claims that the bill "directly affects reserve land rights of nearly all first nations in Canada. Therefore the federal government is under a constitutional fiduciary duty to consult, accommodate, and seek the consent of First Nations."[8]

The federal government's duty to consult and accommodate First Nations peoples was first established in *Haida Nation v British Columbia*.[9] The duty arises when

the Crown knows, or reasonably ought to know, that there exists a potential Aboriginal right that may be adversely affected by government action.[10] However, in clarifying this duty, the Alberta Court of Appeal in *R v Lefthand* found that the when a executive legislative body is obliged to consult with Aboriginal bands, it is not bound to follow the recommendations of the band council.[11] "The right to be consulted is not a right to veto."[12]

The federal government contends that during 2006-07 there was "a comprehensive consultation process" that engaged the Native Women's Association of Canada and the Assembly of First Nations.[13] In contrast, The Nishnawbe Ask Nation claims that, "to date there has been no serious effort to consult First Nations."[14] The NWAC, the AFN, and the Union of BC Indian Chiefs (UBCIF) support the claim that there has been insufficient consultation.[15]

Further Reading

Daina Young, "R. v. Lefthand: Limits on Duty to Consult" *Centre for Constitutional Studies* (undated).
Daina Young, "R. v. Douglas: The Duty to Consult" *Centre for Constitutional Studies* (undated).

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[1] 2nd Sess, 40th Parl 2009.
[2] *Supra* note 3 at sections 7 and 17.
[3] *Constitution Act*, 1867 ss 91(24), 92(13).
[4] [1986] 1 SCR 285.
[5] Bill C-8 is the reincarnation of Bill C-47 which died on the order paper when the 39th Parliament was dissolved.
[6] Native Women's Association of Canada, "NWAC, AFN and AFN Women's Council Unite to Oppose Bill C8 on Matrimonial Real Property" (14 May 2009).
[7] Nishnawbe Ask Nation, "NAN Grand Chief Demands Withdrawal of Federal Legislation on Matrimonial Real Property" (15 May 2009)
[8] *Ibid*.
[9] 2004 SCC 73.
[10] *Ibid* at para 35.
[11] 2007 ABCA 206 at para 39.
[12] *Supra* note 8 at para 48.
[13] Indian and Northern Affairs Canada.
[14] *Supra* note 6.
[15] The Union of BC Indian Chiefs, "UBCIC Opposes Conservative's Bill C-8 Matrimonial Real Property" (19 May 2009).