THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill S-4 *Family Homes on Reserves and Matrimonial Interests or Rights Act*

NATIONAL ABORIGINAL LAW AND FAMILY LAW SECTIONS
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law and Family Law Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law and Family Law Sections of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association National Aboriginal Law and National Family Law Sections (CBA Sections) appreciate the opportunity to comment on Bill S-4, *Family Homes on Reserves and Matrimonial Interests or Rights Act*. The CBA Sections recognize the need for legislation in the area of Matrimonial Real Property (MRP) on reserve. The Bill proposes a mechanism to protect and ensure the rights of spouses, particularly women and children, living on reserve. While we support the underlying intention of the Bill, we believe that it should be improved before it is passed. In this submission, we highlight structural and legal shortcomings in the Bill, and recommend remedies that should be made before the Bill becomes law.

We understand that no consensus among First Nations organizations has been achieved about this Bill. It is important for the federal government to adequately consult First Nations and First Nation organizations before proceeding with this proposed legislation.[1]

II. NEED FOR LEGISLATION

The issue of MRP on reserve has been the subject of Parliamentary scrutiny in recent years, as noted in the Legislative Summary to the Bill.[2] The main concern is a "jurisdictional gap" in the

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1 Wendy Grant-John, Ministerial Representative respecting MRP acknowledged that a consensus between Indian and Northern Affairs Canada (INAC), the Assembly of First Nations (AFN) and the Native Women's Association (NWAC) was not possible through the consultation process and drafting of the legislation (Report of the Ministerial Representative, Matrimonial Real Property Issues on Reserves, March 2007). We understand that the AFN, NWAC and the Quebec Native Women Inc. urged the government not to proceed with the Bill's predecessor (Bill C-47) until proper consultations had occurred. See, Legislative Summary of the Bill: www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=6974&Session=23&List=ls.

See also, NWAC, AFN and AFN's Women's Council press release May 14, 2009, expressing opposition to the Bill, and the Ontario First Nations' press release the same day, opposing unilateral imposition of non-First Nation MRP laws on reserve in favour of a nation-to-nation process. The AFN of Quebec and Labrador also voiced "total opposition" to the legislation in a press release (May 19, 2009).

2 See, Legislative Summary, *ibid*.

Constitution Act, 1867.[3] Property and civil rights fall under provincial power by virtue of section 91(13), and under territorial jurisdiction as delegated by the federal government, giving provinces and territories jurisdiction over the division of matrimonial real and personal property. At the same time, real property on reserve is exempted from the application of provincial and territorial law under section 91(24), which provides for federal jurisdiction over "Indians and Lands Reserved for Indians".

The *Indian Act*[4] does not address MRP issues on reserve. While the *First Nations Land Management Act* provides a mechanism to address MRP issues, it is a statutory regime to which First Nations voluntarily chose to subscribe. Its provisions are not mandatory for First Nations in Canada.[5]

The federal government, in collaboration with the Native Women's Association Canada (NWAC) and the Assembly of First Nations (AFN), commissioned a series of consultations, resulting in a 2007 report by Wendy Grant-John.[6] That report concluded that the simple application of provincial and territorial MRP law to reserves would be insufficient to deal with current deficiencies, and instead recommended a concurrent jurisdiction model like that proposed by Bill S-4. The report also noted that while participants in the consultation did not choose a specific option, a concurrent jurisdiction model appeared to be the most favoured of the options proposed.[7]

III. KEY FEATURES OF THE BILL

Bill S-4 would apply when at least one spouse or common-law partner in a relationship is a First Nation member or an Indian, as defined under section 6 of the *Indian Act*, living on reserve. The remedies upon the breakdown of a conjugal relationship or the death of a spouse would include:

- use, occupation and possession of family homes on reserves;
- exclusive occupation in cases of family violence; and

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3 1867 (U.K.), 30 & 31 Victoria, c. 3.

4 R.S., 1985, c. I-5.

5 *First Nation Land Management Act,* S.C. 1999, c.24, sections 8 to 14.

6 Legislative Summary, *supra* note 1 at 2 – 3.

7 Report of the Ministerial Representative, *supra* note 1, paragraph 196; see also NWAC, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper*, January 2007 (NWAC Position Paper) at 28-29.

- division of value of interests or rights held in structures or lands on reserves.

The Bill is conceptually divided into two parts. The first deals with First Nation law-making power to enact MRP laws. The second proposes Provisional Federal Rules (PFR) to provide a comprehensive MRP scheme for all First Nations across Canada until each First Nation enacts its own comprehensive scheme. The PFR do not duplicate or mirror any existing provincial or territorial MRP regime, but amalgamate various regimes and approaches.

Three Parliamentary committees have observed that the current legislative regime of MRP allocation on reserves does not offer fair and equal rights.[8] Others have emphasized that considerable non-legislative solutions must also be addressed to provide real justice concerning MRP issues on reserve: prenuptial and separation agreements; spousal compensation loan funds; on reserve housing loan funds to address the enormous backlog of housing shortages; women's shelters and transition housing, particularly in remote communities; indigenous dispute resolution; video court for remote communities; adequate family law legal aid funding; treatment facilities; self-government agreements and First Nation housing policies.[9]

Without detracting from those valid, non-legislative solutions, we recognize that the Bill offers significant legislative protection for women and children living on reserve. The Bill's preamble states that with respect to the use and occupation of a family home on reserve and the division of interests held on reserve, a decision-maker should take into account the best interests of the children. The CBA Sections support this statement and does not see it as conflicting with the issue of non-alienability of reserve lands to non-Indians.[10] The Bill's preamble also states that it would enable the First Nation to inform courts about the cultural, social and legal context with respect to certain applications under the Bill.

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8 Senate, Standing Committee on Human Rights, Interim Report, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*, November 2003; House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Fifth Report*, June 2005; House of Commons, Standing Committee on the Status of Women, *Matrimonial Real Property on Reserves*, Seven Report, 1st Session, 39th Parliament.

9 *Matrimonial Real Property on Reserves: Our Lands, Our Families, Our Solutions* (Final Report of the Assembly of First Nations) (Ottawa: AFN, 2007) at 15 to 17; NWAC Position Paper, Appendix A: Summary of Solutions; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Fifth Report, June 2005, at 20-21.

10 See larger discussion of these issues *infra* at 13.

IV. DEFINITIONS

Several of the terms in the Bill should be clarified. For example, the phrase "entered in good faith into a marriage that is void or voidable" needs more precise definition.

No definition of "common law partner" is provided, but section 2(2) says that words and expressions in the Bill have the same meaning as in the *Indian Act*. Section 2(1) of that *Act* defines "common law partner" as being a person who is cohabiting with an individual in a conjugal relationship for a period of at least one year.[11]

In provincial jurisdictions, common law partners and married spouses are often treated differently. It is not clear that this Bill does – or should – do the same. If the intent is not to make a distinction, we suggest simply referring to "spouse",[12] which could be defined as one who:

- is legally married;
- has entered in good faith into what he or she thought was a marriage, whether or not it is void or voidable;
- is recognized as married by the indigenous laws of the First Nation; or
- is or was a common-law partner, so long as action is brought within one year of that relationship ending.

Bill S-4 relies on the definition of "reserve" in the *Indian Act*. The Yukon has self-governing First Nations with "retained reserves", being section 91(24) lands not considered "reserves" under the *Indian Act*. The definition for "interest" or "right" in the Bill suggests that it is meant to apply to self-governing First Nations:

> "interest" or "right" means
>
> (b) an interest or right in or to reserve land that is subject to any land code or First Nation law as defined in subsection 2(1) of the First Nations Land Management Act, to any First Nation law enacted under a self-government agreement to which Her Majesty in right of Canada is a party, or to any land governance code adopted.

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11 *Supra* note 4, section 2(1) "common law partner".

12 We note that NWAC has also proposed a singular definition for spouse: *Report of the Ministerial Representative, supra* note 1, paragraph 239.

To avoid confusion, we suggest that reserves, and the different types of interests in reserves, be clearly and specifically defined in the Bill.

The Bill does not define "matrimonial property". Section 33 would in effect divide all property without considering what may or may not constitute "matrimonial property" in the first place. BC legislation refers to property that is ordinarily used for a family purpose. Other jurisdictions define matrimonial property through a list of included and excluded assets. The language of the section is somewhat confusing, especially section 33(3)(c) concerning compensation orders.

RECOMMENDATION

The Canadian Bar Association Sections recommend that section 33 be clarified and include an introductory principle to distinguish between family and non-family property for the purposes of sections 33(2)(b) and (c) and 33(3)(b) and (c).

Finally, for community approval of First Nation MRP laws, section 13(2) would require a majority vote, with a turn-out of over twenty-five percent of eligible voters. However, "eligible voter" is not defined in the Bill, and the *Indian Act* uses instead the term "elector". Section 11(2) provides the criteria by which someone is eligible to vote. We recommend that the Bill be amended to remove section 11(2), and a redrafted version of "eligible voter" be added to section 2(1).

RECOMMENDATION

The Canadian Bar Association Sections recommend omitting section 11(2) and instead adding a redrafted version of "eligible voter" to section 2(1).

V. NON-DEROGATION

Section 5 of the Bill provides a non-derogation clause that appears based on a similar clause in the *First Nation Land Management Act*.[13] Section 5 says:

> For greater certainty,
> (a) title to reserve lands is not affected by this Act;

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13 Report of the Ministerial Representative, *supra* note 1 at par. 238; see also *First Nation Land Management Act,* S.C. 1999, c.24, section 5.

> (b) reserve lands continue to be set apart for the use and benefit of the First Nation for which they were set apart; and
>
> (c) reserve lands continue to be lands reserved for the Indians within the meaning of Class 24 of section 91 of the *Constitution Act, 1867.*

Issues of MRP on reserve are connected to many other issues respecting self-government and indigenous legal traditions. Canada is a legally pluralistic society, and indigenous legal traditions stand beside the civil law and the common law.[14] As organized societies prior to the arrival of Europeans, Aboriginal peoples had governance powers including law-making powers, and those powers were never extinguished.[15] This right of governance is, in part, what enables Aboriginal peoples to enter Treaties with the Crown.[16] Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights, including the right to self-government.[17]

To make explicit the Bill's intent not to trench on existing constitutional rights to self-government and on indigenous legal traditions protected by section 35 of the *Constitution Act, 1982*, we recommend that its non-derogation clause be amended as indicated:

> For greater certainty,
>
> (a) title to reserve lands is not affected by this Act;
>
> (b) reserve lands continue to be set apart for the use and benefit of the First Nation for which they were set apart;
>
> (c) reserve lands continue to be lands reserved for the Indians within the meaning of Class 24 of section 91 of the *Constitution Act, 1867*; and
>
> (d) nothing in this Act shall be construed so as to abrogate or derogate from aboriginal or treaty rights recognized and affirmed by section 35 of the *Constitution Act*, *1982.*

RECOMMENDATION:

The Canadian Bar Association Sections recommend the non-derogation clause in Bill S-4 be amended to add:

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14 John Burrows, *Indigenous Legal Traditions in Canada*, Report for the Law Commission of Canada, January 2006, Executive Summary at (i).

15 Burrows, *ibid* at 149; see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at par. 30.

16 Burrows, *ibid* at 151. See also, *Campbell v. British Columbia (AG)*, 2000 BCSC 1123 at paras. 85-86, 95 and 179-181, which establishes that First Nations have power to enter treaties with the Crown arising from their inherent right to self-government and that such right survives, although in a diminished form, the assertion of sovereignty by the Crown.

17 See *Campbell v. BC.*, *ibid*.

> **(d) nothing in this *Act* shall be construed so as to abrogate or derogate from aboriginal or treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.**

VI. FIRST NATIONS' MRP LAWS

Sections 7-16 of Bill S-4 provide for the enactment of First Nation MRP laws. Section 7 gives legislative authority to First Nations to enact MRP laws. Section 7(2) requires that First Nation MRP laws include procedures for amending and repealing those laws, and provides that the laws may also include administrative provisions and provisions for enforcing court orders on reserve, despite section 89(1) of the *Indian Act*.

This part of the Bill also requires that a certain verification process be followed by a First Nation to enact MRP laws. Section 8 enables the Minister to designate an "organization" to assist in the verification process. Sections 9 and 10 provide for appointment of a verification officer to determine whether the proposed process of community approval conforms to the Act and whether the actual process follows that proposal. Sections 11 to 15 prescribe the minimum requirements of the community approval process to be followed.

Aboriginal governance is an independent legal right, and does not depend for its existence on any grant of authority from the executive or legislative bodies of Canada.[18] Sections 7 to 15 of the Bill may be too prescriptive and could infringe the Aboriginal right of self-governance to legislate MRP according to their own indigenous legal traditions, including the process for making decisions that affect the community as a whole. The *First Nation Land Management Act* contains an equally prescriptive verification and approval process for land management codes, but is a statutory regime to which First Nations voluntarily subscribe.[19] In contrast, this Bill would impose a mandatory scheme on First Nations. It could infringe the right to self-government and provide insufficient deference to indigenous legal systems. We suggest that this issue requires further consideration.

> **RECOMMENDATION:**
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> **The Canadian Bar Association Sections recommend that sections 7-15 of Bill S-4 be reconsidered to ensure they would not**

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18 Burrows, *supra* note 14 at 151.

19 *First Nation Land Management Act,* S.C. 1999, c.24, sections 8 to 14.

infringe the right to self-government, and show appropriate deference to indigenous legal systems.

As noted above, section 13(2) of the Bill requires a majority vote with a voter turn-out in excess of twenty-five percent of eligible voters. This is a higher standard for approval of MRP laws than required under the *Indian Act* for surrender of reserve lands by a First Nation.[20] The *First Nation Land Management Act* adopts the higher minimum standard of twenty-five percent of eligible voters, but again there are two important differences between it and Bill S-4; adoption of a land management code is purely voluntary, and, equally importantly, the government has provided extensive funding and technical resource support to First Nations who decide to assume jurisdiction over their reserve lands.[21]

It is significant that the Bill's process for First Nations to create MRP laws does not include funding or resourcing commitments. Bill S-4 should provide resources to First Nations, so that those who wish to enact their own MRP laws can do so meaningfully.

Finally, although the PFRs are termed "provisional" and a necessary temporary measure to address MRP issues, they could well become more permanent than anticipated, simply because many First Nations will not have the resources to create and administer their own MRP rules. Providing the necessary resources would allow First Nation communities to develop MRP laws according to own their indigenous legal traditions and customs. There are several examples of other recent legislative reforms where the government has coupled new legislation with resources to ensure effective implementation.[22]

We stress that without a similar resource commitment for Bill S-4, the PFR is apt to become the *de facto* regime for many First Nations, given the reality that most are severely under-

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20 Section 39 of the *Indian Act* establishes the "double majority" rule - a majority of eligible electors must vote on a surrender or designation of reserve land, and a majority of them must approve the surrender or designation. If a majority of electors does not vote, the Minister may call another meeting and if, at that meeting, a majority of electors present vote in favour, the assent is deemed to have been given by a majority of electors of the Band. In effect, a surrender of reserve lands can occur with less than a 25% majority of electors i.e. eligible electors. There appears to be no rationale why the adoption of MRP laws that affect reserve lands should require a higher standard than that used for the surrender of such lands.

21 See sections 6 and 12 of the *First Nation Land Management Code*. While funding has been gradually withdrawn, the FNLMA was initially well funded. See, http://fafnlm.com/content/en/index.html which provides information about the Framework Agreement on First Nation Land Management, signed by the Minister of Indian Affairs and Northern Development (INAC) and thirteen First Nations on February 12, 1996, and the financial reports of the First Nations Lands Advisory Board that show the level of funding provided by INAC.

22 See for example, *First Nation Land Management Act* or the *Specific Claims Tribunal Act*.

resourced in terms of governance development. Due to a lack of proper resourcing, the PFR provisions could effectively bury existing indigenous legal traditions, which is an unintended and undesirable result. We recommend that the federal government commit funding to ensure that First Nations can meaningfully take advantage of sections 7 to 16 of the Bill.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that the federal government provide adequate funding and other supports to First Nations to allow them to create and implement their own MRP legislation under Bill S-4.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that section 7, which provides procedures for amending and repealing First Nations MRP laws, be subject to a prescribed community approval process when the amendment affects the substance of, or repeals the laws.

As currently drafted, Bill S-4 would give increased responsibility to provinces and territories for First Nations' affairs. This could mean:

- additional burdens on already burdened justice systems in the provinces and territories;
- additional burdens on the administration of the PFR generally, and to deal with specific conflicts between the PFR and the MRP law in the province/territory; and
- additional costs to administer MRP laws for on reserve property.

Provincial and territorial administration of the PFR will require initial efforts to establish systems to deal with the proposed interim solution. The specialized legal expertise to litigate cases of MRP on reserve is also a significant factor. Judges and lawyers will require familiarity with the PFR and also with the content and concepts of the *Indian Act* (for example, Certificates of Possession and Certificates of Occupation), as well as the customary allotment regimes for each First Nation.

Accessibility to provincial and territorial courts for First Nations' people is a primary concern, as travel to large judicial centers is often a financial and logistical challenge. There are already significant problems with access for accused in criminal court proceedings, particularly in

remote communities. For civil matters at the Superior Court, which will presumably not follow the circuit court model used for criminal proceedings, access may be all the more difficult.[23]

We have serious concerns about how already overburdened legal aid plans would provide access to professional legal representation for these cases. The PFR would surely increase demand for family law services, and in jurisdictions where those services are provided at all, they are generally inadequately funded, limited in scope and in short supply.[24] The federal government does not deliver family legal aid, given that it falls under provincial and territorial jurisdiction, but provincial and territorial governments say they require a greater financial commitment from the federal government to be able to provide it.[25] The challenges of delivering legal services to clients in remote First Nations' communities and in the north are particularly great, and the limited number of lawyers available can lead to conflict issues. Coupled with those realities, legal aid service providers may require additional training to provide expertise in First Nations' law. We strongly suggest that these serious concerns about access to justice and the practical impact and application of the Bill be fully and satisfactorily addressed before legislation is enacted.

RECOMMENDATION:

The CBA Sections recommend that, prior to coming into force, administration agreements be entered between the federal government and each of the provinces and territories concerning the additional jurisdiction that the Bill will confer on provincial and territorial courts.

RECOMMENDATION:

The CBA Sections recommend that the federal government commit resources to implement Bill S-4, which would include additional federal funding earmarked to ensure acceptable minimum levels of family legal aid services across Canada, and sufficient to allow legal aid plans to provide specialized lawyers knowledgeable in family and Aboriginal law for eligible clients in MRP proceedings.

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23 We note that others have raised the issue of access to justice as well, notably the AFN: Final Report of the Assembly of First Nations, *supra* note 9 at 16.

24 CBA has raised concerns about inadequate family legal aid in various contexts: see http://www.cba.org/CBA/Advocacy/legalAid/position.aspx.

25 See, for example, Press Release following a meeting of Federal/Provincial/Territorial Justice Ministers in 2008 : http://www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32302.html

VII. BALANCING RIGHTS

Bill S-4 appears to balance two legitimate policy objectives:

> protection of individual rights of spouses and common-law partners (in particular women) to matrimonial property located on reserve; and
>
> protection of the collective rights and interests of Bands in their reserve lands.

In attempting this balance, Bill S-4 could create long term rights to, or interests in, reserve lands for non-Band members and non-Aboriginal people. The Bill would divide the value of any interests or rights held by spouses or common-law partners in, or to, structures and lands on those reserves. According to the INAC website:

> The objective of the proposed *Act* is to provide basic rights and remedies to individuals on reserves during the relationship, in the event of a relationship breakdown, and on the death of a spouse or common-law partner regarding the family home and other matrimonial interests or rights.

These objectives are more than mere policy considerations; they are each rooted in concrete laws and legal principles. The first is based on existing legislation such as the federal *Divorce Act* and equality provisions including sections 15 and 28 of the *Charter*. The second is governed by the *Indian Act* and section 35 of the *Constitution Act, 1982*.

Under section 2 of the *Indian Act*, a reserve is a tract of land "that has been set apart by Her Majesty for the use and benefit of a Band". Furthermore, section 18 states:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective Bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the Band.
>
> 18.1 A member of a Band who resides on the reserve may reside there with his dependent children or any children of whom the member has custody.

The Supreme Court of Canada in *Derrickson v. Derrickson* summarized section 18 as follows:

> The purpose of the above subsection is to ensure that lands reserved for Indians are and remain used for the use and benefit of the Band.[26]

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26 *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at par. 22.

Mr. Justice Judson, speaking for four of five judges at the Supreme Court of Canada in *The Queen v. Devereux* stated:

> The scheme of the *Indian Act* is to maintain intact for Bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s.28(1) of the *Act*.[27]

Section 28(1) prevents Indians from alienating their rights to possession, except by lease or permit:

> 28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a Band or a member of a Band purports to permit a person other than a member of that Band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the Band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Because of section 50(1), persons who are not members of the Band also cannot acquire a right to reside on or possess reserve lands by inheritance:

> 50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

These provisions reflect the underlying historical significance for setting aside reserve lands. The Supreme Court of Canada in *Opetchesaht Indian Band v. Canada* considered the policy behind the rule of general inalienability of reserve land:

> The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and Band. This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual Band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: Blueberry River Indian Band, *supra*, at p. 370, per McLachlin J.[28]

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27 *The Queen v. Devereux* (1965), 51 D.L.R. (2d) 546 at 550 (S.C.C.).

28 *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119.

The rule of inalienability is a necessary bulwark against eroding Band ownership in reserve lands. Bill S-4 attempts to find a balance between that rule and protecting the family obligations towards dependent children and spouses of Band members, whether or not they are themselves Band members. Both domestic law and international treaties insist that inalienability cannot be an excuse for disregarding the interests of children or married or common law partners, but neither can domestic rights become the thread that unravels the fabric of Band ownership.

VIII. CREATING NEW RIGHTS AND INTERESTS

Bill S-4 would attempt to address the presently unequal distribution of property rights on reserves between married and common-law partners by providing certain interests in, or rights to matrimonial property during and after a conjugal relationship. In addition to equality in property rights, the Bill would address other family law issues, like domestic violence and the best interest of the child.

A. Occupation of the Family Home

Section 18 of the Bill would provide that a spouse or common-law partner may occupy the family home during the "conjugal relationship", whether or not the person is a First Nation member or an Indian. Section 19 says that person may occupy the family home on the death of the other partner for up to 180 days (and can apply for an extension under section 26). In effect, these provisions would override the pith and substance of sections 18, 20, 28, 30 and 31 of the *Indian Act*. However, they do not create any long term interests in property or land, providing only for a finite period of occupation. In this regard, these provisions appear to address the doctrine of minimal impairment enunciated by the Supreme Court of Canada in *Opetchesaht Indian Band*.

B. Emergency Protection Order

Section 21 of the Bill would permit a spouse or common-law partner to apply for an emergency protection order (EPO) in urgent situations, such as family violence, to ensure the immediate protection of persons or property. This would include an order for the exclusive occupation of the home. There is a time limit of 90 days for an EPO (which can be extended by the court up to another 90 days, per section 23). An EPO would be available regardless of whether the surviving or remaining partner is a First Nation member or an Indian. Again, this provision

would appear to address the doctrine of minimal impairment, due to the temporary nature of the interest granted by an EPO.

C. Exclusive Occupation Order

Section 25 of the Bill would allow the court jurisdiction to grant exclusive occupation orders (EOO) respecting the family home on reserve to a spouse or common law partner, whether or not the partner is an Indian or Band member. The court would have discretion as to duration of the order, considering a variety of factors set out in the Bill. A spouse or partner could apply for this order either during or after the relationship ended, including upon the death of the other spouse or partner.

We believe omitting any limit on duration is a particular concern. It could create a life interest in the home (a beneficial interest, if not a legal interest) for non-Band members and non-First Nations, though the Bill is clear that it does not affect legal interest to title. There is a potential conflict between these provisions and the policy objective of maintaining and preserving a Band's interest in its reserve lands.

D. Division of Property and Compensation

Section 33 of the Bill provides that upon the breakdown of a relationship, each spouse or common law partner would be entitled to a half interest in the family home, and to half the value of other matrimonial interests or rights held by the other spouse or partner to structures or lands on reserves. Similar division of property would apply in the event of the death of a partner, under section 39. Real property on reserve would be divided using rules of compensation of one spouse or partner to the other. Sections 34 and 40 set out factors the court may consider on an application to vary the "one half valuation" presumption.

Consistent with the *Indian Act*, under section 36, actual legal title (like a Certificate of Possession) would only be permitted to be transferred to the other spouse if the applicant is a Band member.

IX. RIGHTS AND INTERESTS PROVIDED BY BILL S-4

The proposed PFR regime in Bill S-4 would create a potential life interest in reserve lands to a non-Band member or Indian. We believe that the proposed regime would not properly account for differences in land holdings and housing categories on reserve.

E. Life Interest in Reserve Lands for non-Band members

While the Bill does not purport to "alienate" reserve lands from a First Nation, the EOO conceptually allows for a potential life interest in property on reserve to non-Indians and non-Band members, effectively removing that property from the use and benefit of the Band during that period. Under section 30, this potential interest could include not only the former family home but also the land contiguous with the structure necessary for the use and enjoyment of, and access to the structure. If a relationship breakdown occurs, a non-Indian, non-member spouse could be granted exclusive occupation of the family home with the children for the rest of that spouse's life. If that person is young, exclusive occupation could amount to 60 or more years.

The Bill provides "occupation rights" rather than addressing the rules of possession set out under sections 18 and 20 of the *Indian Act*. The difference between "exclusive occupation" and "possession" is unclear. If a person has possession, that would enable occupation, and if the person is in occupation, that person is in possession. While an EOO may not purport to grant an interest as broad as a Certificate of Possession under the *Indian Act*, it is still an "exclusive" occupation order, implying that no one else would have the right to occupy or possess the family home and necessarily contiguous land during the term of the order. How that differs from a legal right of "possession" and how it is to interact with sections 18 and 20 of the *Indian Act* is not at all obvious.

It is also unclear how several of the Bill's provisions could be reconciled with section 89 of the *Indian Act*, enacted for the purposes of protecting real property on reserve:

> 89. (1) Subject to this *Act*, the real and personal property of an Indian or a Band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a Band.

Section 7(2)(b) of the Bill would create an exception to section 89 for First Nation MRP laws passed under the Bill. However, the key operative provisions of the Bill - sections 21, 25, 26, 30, 33, 34, 38, 39, and 40 – do not refer to how the prohibition against any charges in favour of a non-Indian against the real property of an Indian or a First Nation on reserve are to be reconciled. Section 56 of the Bill would also grant explicit authority to a Band council to enforce a court order made on behalf of a non-member and non-Indian against a First Nation member, without making any reference or exception to section 89, which would make the Band

council potentially liable to the Band member for enabling such enforcement (e.g. garnishment of wages). This conundrum has been acknowledged by the Minister's office,[29] yet does not appear to have been resolved satisfactorily.

i. Principal of "minimal impairment"

The long-term rights afforded to non-Band members and non-Indians under the Bill appear to be inconsistent with the principal of "minimal impairment" of the Indian interest in reserve lands. The principal of minimal impairment is usually used in the context of Crown expropriation of reserve lands. As stated by the Supreme Court of Canada in *Osoyoos Indian Band v. Oliver (Town)*,[30]

> 52. In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the Band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
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> 54. The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the *Indian Act* which is to prevent the erosion of the native land base: *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.

Though exclusive occupation orders in Bill S-4 would not actually expropriate land or remove land from the reserve, they would grant exclusive occupation, that is possession of a structure and the necessarily contiguous land around for the use and enjoyment of, and access to, that property. This seems to go against the policy objective of protecting a First Nation's interest in the lands reserved for their use and benefit and the principle of minimum impairment.

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29 Report of the Ministerial Representative, *supra* note 1 at paras. 271 to 273.

30 *Osoyoos Indian Band v. Oliver* (Town), [2001] S.C.J. No. 82.

Exclusive occupation orders for non-Band members or non-Indians effectively remove land and housing from the use and benefit of the First Nation for the duration of the order.

In our view, the minimal impairment of a Band's interest in its lands should at least be a factor considered by the courts on application for an order for long-term occupation of the family home by a non-Band member.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amended to require the court to consider the principle of minimal impairment as a factor when making an order for long-term occupation of a family home on reserve by a non-Band member.

ii. Restrictive policy on duration of leases

As previously discussed, the Bill does not restrict the duration of exclusive occupation orders. This is inconsistent with the federal government's present policy on leasing reserve lands.

While there are no internal time limitations in the *Indian Act* on leases of locatees (ie. Indians who hold Location Tickets, now called Certificates of Possession or CPs) or First Nation lands, INAC policies impose limitations. For lands held by CPs, INAC will not grant a lease of more than 49 years without a supporting Band Council Resolution , reflecting the First Nation's residual interest in reserve lands. This is differentiated from the lease of Band lands (i.e. lands possession in common by the First Nation as opposed to CP lands), where INAC's policy is to grant leases for no longer than 99 years.

INAC's policy is at least in part in response to the 2002 Federal Court of Appeal decision in *Tsartlip Indian Band v. Canada*.[31] The court held that the Minister of Indian Affairs, in exercising discretion under section 58(3) to grant a CP holder's application to lease, must give proper consideration to the interests of both the certificate holder and the Band. The court held that this duty arises from administrative law principles, rather than a fiduciary duty owed by the Minister to the Band. The court observed that the *Indian Act* is "very much Band-oriented where use of lands in the reserve is at issue". More specifically:

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31 *Tsartlip Indian Band v. Canada* (Minister of Indian Affairs and Northern Development) (C.A.), [2000] 2 F.C. 314.

> 55. The intent of Parliament, clearly, is to require the consent of the Band council whenever a non-member of the Band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year.

In our view, Bill S-4 does not adequately address the intent of Parliament expressed in the *Indian Act*. The INAC policy limitations that have effectively limited the alienation of reserve lands to non-Band members through leasing are not reflected or even included as a factor for the court to consider when fashioning an appropriate order for long term occupation of a family home by a non-Band member or non-Indian. The court should be required to consider such principles, so that long-term possession of structures and contiguous land around such structures are not provided to non-members without dialogue with the First Nation involved.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amended to require the court to consider policies that limit the alienation of reserve lands to non-Band members without consent of the First Nation.

F. Accounting for differences in land holdings and housing categories on reserve

Bill S-4 does not differentiate adequately between CP and Band-owned property on reserve. The only provisions that even allude to such distinctions are sections 30 and 31:

> 30. For the purposes of sections 21, 25 and 26, if the reserve land on which the family home is situated is the object of an interest or right referred to in subparagraph (*a*)(i) of the definition "interest or right" in subsection 2(1), exclusive occupation of the family home includes exclusive occupation of the portion of that land that is contiguous to the family home and that is strictly necessary for the use and enjoyment of the family home.
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> 31. When an order made under any of sections 21 to 23, 25 or 26 grants exclusive occupation of the family home to a spouse or common-law partner who is not a lessee under the lease for the family home, the spouse or common-law partner is bound by the lease during the period of the order.

The lack of differentiation not only affects what remedies or orders are available to a spouse or common-law partner, but the mechanisms for realizing those remedies as well. It is also significant since certain remedies (like exclusive occupation of the home) have different effects on the community depending on the type of land and housing subject to the order.

MRP on reserve may be situated on any of the following five categories of land:

i. "*Indian Act* land": Land allocated to individual Band members under s. 20 of the *Indian Act*. The person listed on the Certificate of Possession has the right to live on the land and a home situated on the land allotment.

ii. "Customary Allotment land": Land allocated to individual Band members through a custom allotment system. Not recognized as a legal right to the land parcel under the *Indian Act*.

iii. "Traditional land": Land that is regarded as belonging to a particular family through tradition or custom.

iv. "General Band land": Land held by the Band for all Band members. The right of any individual to stay in the home may depend on Band policies and the type of housing located on it - capital, social or rental housing.

v. "Designated lands": Reserve lands set aside for a specific period of time and a specific purpose such as industrial parks, long term lease, urban development.

Two broad categories of housing may be situated on any one of the range of land holdings:

vi. "Band-owned" housing: This includes "social housing" owned by the Band for which members repay the Band and when the house is fully paid off, the Band transfers possession to the Band member and "Band-owned rental housing" rented from the Band.

vii. "Individually-owned" or "Capital" housing: This is paid for by the Band member occupying it and for which bank loans may have been obtained or a subsidy from the Band.

Finally, the severe lack of housing on some reserves is a critical issue facing most First Nations. We appreciate that Bill S-4 attempts to remedy situations where the spouse who leaves the matrimonial home may have to either live in overcrowded conditions with friends or relatives or leave the reserve altogether by providing new rights and interests to spouses and common-law partners. However, the effect of granting a long-term or life interest in a home to a non-Band member could exacerbate the dismal housing situation on reserve.

While section 25(3)(e) addresses the "availability of other suitable accommodation that is situated on the same reserve as the family home," it does so without the court having to address the legal nature of alternative accommodation and the category of housing involved. For example, the home could be located on CP land not owned by either spouse or partner, subject to a lease between the third party CP holder and the Band, such that the Band subleases the structure as family housing to low-income Band members. Another possibility is that a family home was built by the Band on common reserve land for social housing purposes, and there is a substantial waiting list for such housing. A court should be informed of these

realities before granting an exclusive possession order to limited public housing. Finally, there are many reserves on which land is granted and passed along by way of unwritten indigenous legal systems, particular to the First Nation in question. Without access to the indigenous legal tradition of that community, a court may issue an EOO that effectively excludes the person whom the community recognizes as possessing that land.

We believe that the court should consider the nature of the interest in question when fashioning orders under the Bill respecting structures and lands situated on reserve. Just as the law should consider each family situation, so should the law account for each reserve as it is possessed and used by the particular First Nation involved. A 'one-size-fits-all' approach to land on reserve will not work fairly.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amended to require the court to consider the nature of the interest in question when fashioning orders under the Bill respecting structures and lands situated on reserve.

G. Judicial consideration of Aboriginal cultural context

Section 46 of Bill S-4 would allow a Band council to apply to make submissions to the court. It would require that the Band council must be notified of all applications (except ERO applications) and may make representations to the court about the cultural, social and legal context of the application, as well as views as to whether the order should be made.

While this adds a layer of protection to a First Nation's interest in its reserve lands, it does not require the court to consider principles of minimal impairment and long-term alienation of no more than 49 years. Further, a Band council may not actually raise such legal principles or even be present to make submissions. In our view, the court should take notice of, and considers these indigenous legal principles regardless of a Band council's involvement.

A Band council is a creature of the *Indian Act*.[32] It is not necessarily the primary repository of a First Nation's indigenous legal traditions. There may be as many different people knowledgeable about the indigenous legal traditions of a First Nation as there are First Nations. Elders or clan or house leaders carry knowledge of indigenous legal traditions in each First

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32 *Indian Act*, *supra* note 4, section 2(1) "council of the Band."

Nation. Such people should have access to the court to speak of customs, traditions and cultural practices, and the court needs access to these people for the appropriate context to make the various orders allowed under this Bill. We recommend that section 46 and section 25(3)(c) be expanded to give standing to other indigenous law knowledge holders recognized by the First Nation.

RECOMMENDATION:

The Canadian Bar Association Sections recommend that sections 46 and 25(3)(c) be expanded to give standing to indigenous law knowledge holders recognized by the First Nation, as well as Band councils.

Several sections of the Bill provide factors concerning cultural context that the court must weigh when making certain orders. Some examples are section 21(4) (EPOs), section 25(3) (EOOs), section 26(3) (variation of EOOs), section 34 (variation of "one half valuation" rule for division of property), section 38 (assessment of separation agreement) and section 40 (variation of "one half valuation" rule on death of spouse). However, none include the indigenous legal traditions or cultural context of the First Nation as a factor that the court must consider.

In our view, this is a significant omission. The cultural context and indigenous legal traditions of the particular First Nation should not be the only or even the predominant factor, but should be acknowledged as relevant. This is essential for the multi-juridical nature of Canada's legal system to have meaning for First Nations. It is insufficient to create the legislative space for First Nations to enact their own MRP laws; the PFR must also make space for indigenous laws to avoid perpetuating the colonial nature of the *Indian Act*.[33]

RECOMMENDATION

The Canadian Bar Association Sections recommend that sections 21(4), 25(3), 26(3), 34, 38, and 40 be amended to include the cultural context and relevant indigenous legal traditions of the First Nation to whom the Indian spouse is a member as factors that the court must consider.

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33 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Fifth Report*, June 2005, at 15.

X. OTHER CONCERNS WITH THE BILL

There are several miscellaneous issues in Bill S-4 that we believe also require attention.

Under section 26(3)(h) (EOO after death of a spouse or common law partner), the court must consider the interests of any person who holds or will hold an interest of right in or to the family home. In other words, the court must account for the interests of an heir before issuing an EOO in favour of the surviving spouse. The provision would also require the court to account for the interest of a person who holds possessory right to the family home but who is not the deceased spouse (e.g. a CP holder).

It frequently happens that one person in an extended family may hold the CP to a parcel of land, and other family members live in houses on that same CP. Section 26(3)(h) would enable the court to consider the CP holder's interests. In our view, the same protection should be afforded to a CP holder under section 25, as the same scenario would often apply. As it is, the Bill would not require courts to consider the CP holder's interests under section 25(3).

RECOMMENDATION

The Canadian Bar Association Sections recommend that section 25(3) be amended to require consideration of the CP holder's interests.

For legislative clarity, the use of the term "family violence" in section 27 should be cross-referenced to the definition of the same term in section 21(9). The term is currently defined only for the purpose of section 21, not the Bill generally.

RECOMMENDATION

The Canadian Bar Association Sections recommend that the term "family violence" in section 27 be cross-referenced to the definition of the same term in section 21(9).

Section 34 provides for variation of the "one half valuation" rule under section 33 in dividing matrimonial interests and rights. One factor the court must consider is the availability of accommodation comparable to the family home situated on the *same reserve* as the family home" (emphasis added). The market for homes on reserve is usually small. Some First Nations have more than one reserve with residential housing, and we suggest that those other

reserves might also be considered. Valuations from neighbouring reserves of other First Nations may also be useful when considering the value of a family home.

RECOMMENDATION

The Canadian Bar Association Sections recommend that section 34 be expanded to allow for consideration of other family homes similarly situated on comparable reserves.

It is unclear how sections 26, 28, 39, 40 and 42 of the Bill would interact with the "descent of property" provisions of the *Indian Act* (sections 42 to 50.1). These sections appear to exclude those provisions, though not explicitly. Conflict between the two statutes should be avoided.

RECOMMENDATION

The Canadian Bar Association Sections recommend that sections 26, 28, 39, 40 and 42 be amended to either acknowledge the priority of the *Indian Act* or to expressly override the applicable *Indian Act* provisions.

In common law trust claims, the court may choose between the "value survived" and the "value contributed" depending on what is most appropriate in the circumstances. Section 33 would allow no similar discretion, but instead require use of the greater of the contribution or the increased value. It is not always appropriate for married spouses to be "made whole" as to expenditures paid toward family assets during the course of the marriage.

RECOMMENDATION

The Canadian Bar Association Sections recommend amendments to sections 33(2)(b) and (c) and 33(3)(b) and (c) so a court may choose between the value survived and the value contributed when determining the most appropriate recognition of a common law trust claim.

Sections 41 and 49(1) of the Bill confer jurisdiction on a court to order the transfer of an interest in real property of an Indian to the surviving spouse if that spouse is an Indian. This seems to conflict with sections 42 and 44 of the *Indian Act*, which say that the Minister has exclusive jurisdiction with respect to the property of deceased Indians unless the Minister consents to the court exercising the Minister's jurisdiction under the *Indian Act*. Again, needless conflict between Bill S-4 and the *Indian Act* should be avoided.

RECOMMENDATION

The Canadian Bar Association Sections recommend that sections 41 and 49(1) of the Bill be amended to either acknowledge the priority of the *Indian Act* or to expressly override the applicable *Indian Act* provisions.

Section 51 of the Bill would provide that rules of practice and procedure applicable to proceedings under the PFR will be made by the "competent authority" governing such matters in each respective territory or province. The administration of justice is a provincial/territorial matter and having similar procedures governing family law issues on and off reserve makes some sense, but there may be unanticipated risks. The Bill's proposed legislative scheme should apply equally to all First Nation communities across Canada, so each member or party entitled to the proposed protections can actually take advantage of them.

Under section 21(5) and section 2(1), it may be that a "designated judge" hearing EPO applications would often be provincially appointed justices of the peace. In remote First Nation communities, the "designated judge" may then be a Band member. The threshold evidence required by various justices of the peace to trigger EPOs could vary significantly.

The Bill also suggests that parties would be able, on a timely basis, to put additional evidence before the courts on a rehearing of an EPO or EOO. This is unrealistic for many communities where judical centres are far away and circuit court may come a few times a year, weather permitting. If the rehearing occurs in a judicial centre elsewhere, the applicant and respondent would need the financial means to travel to the rehearing. With respect to a EPO application, the very remoteness of a community would also limit a respondent's ability to oppose the application.

RECOMMENDATION

The Canadian Bar Association Sections recommend that section 51 and Bill S-4 as a whole be reviewed to consider discrepancies in access to justice, particularly for remote First Nation communities. After review, basic standards such as evidentiary thresholds should be articulated to ensure the proposed legislative scheme applies as consistently as possible across Canada.

XI. CONCLUSION

The CBA recognizes that Bill S-4 represents an important step forward to address systemic problems with MRP interests on reserves. However, the implications of Bill S-4 over inherent rights of self-government and over First Nations citizens and reserve lands call for in-depth consultation before the Bill proceeds further in the legislative process. Federal decisions concerning reserve lands engage the Crown's fiduciary duty, again requiring national consultation with First Nations and representative organizations.

We suggest that the Bill requires improvement and further consultation before moving forward. We have also recommended specific changes that we believe should be made before the Bill is passed into law.

XII. SUMMARY OF RECOMMENDATIONS

- The Canadian Bar Association Sections recommend that section 33 be clarified and include an introductory principle to distinguish between family and non-family property for the purposes of sections 33(2)(b) and (c) and 33(3)(b) and (c).
- The Canadian Bar Association Sections recommend omitting section 11(2) and instead adding a redrafted version of "eligible voter" to section 2(1).
- The Canadian Bar Association Sections recommend the non-derogation clause in Bill S-4 be amended to add:

  > (d) nothing in this *Act* shall be construed so as to abrogate or derogate from aboriginal or treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

- The Canadian Bar Association Sections recommend that sections 7-15 of Bill S-4 be reconsidered to ensure they would not infringe the right to self-government, and show appropriate deference to indigenous legal systems.
- The Canadian Bar Association Sections recommend that the federal government provide adequate funding and other supports to First Nations to allow them to create and implement their own MRP legislation under Bill S-4.
- The Canadian Bar Association Sections recommend that section 7, which provides procedures for amending and repealing First Nations MRP laws, be subject to a prescribed community approval process when the amendment affects the substance of, or repeals the laws.
- The CBA Sections recommend that, prior to coming into force, administration agreements be entered between the federal government and each of the provinces and territories concerning the additional jurisdiction that the Bill will confer on provincial and territorial courts.
- The CBA Sections recommend that the federal government commit resources to implement Bill S-4, which would include additional federal funding earmarked to ensure acceptable minimum levels of family legal aid services across Canada, and sufficient to allow legal aid plans to provide specialized lawyers knowledgeable in family and Aboriginal law for eligible clients in MRP proceedings.
- The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amended to require the court to consider the principle of minimal impairment as a factor when making an order for long-term occupation of a family home on reserve by a non-Band member.
- The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amended to require the court to consider policies that limit the alienation of reserve lands to non-Band members through leasing without consent of the First Nation.

- The Canadian Bar Association Sections recommend that section 25 of Bill S-4 be amend to require the court to consider the nature of the interest in question when fashioning orders under the Bill respecting structures and lands situated on reserve.
- The Canadian Bar Association Sections recommend that sections 46 and 25(3)(c) be expanded to give standing to indigenous law knowledge holders recognized by the First Nation, as well as Band councils.
- The Canadian Bar Association Sections recommend that sections 21(4), 25(3), 26(3), 34, 38, and 40 be amended to include the cultural context and relevant indigenous legal traditions of the First Nation to whom the Indian spouse is a member as factors that the court must consider.
- The Canadian Bar Association Sections recommend that section 25(3) be amended to require consideration of the CP holder's interests.
- The Canadian Bar Association Sections recommend that the term "family violence" in section 27 be cross-referenced to the definition of the same term in section 21(9).
- The Canadian Bar Association Sections recommend that section 34 be expanded to allow for consideration of other family homes similarly situated on comparable reserves.
- The Canadian Bar Association Sections recommend that sections 26, 28, 39, 40 and 42 be amended to either acknowledge the priority of the *Indian Act* or to expressly override the applicable *Indian Act* provisions.
- The Canadian Bar Association Sections recommend amendments to sections 33(2)(b) and (c) and 33(3)(b) and (c) so a court may choose between the value survived and the value contributed when determining the most appropriate recognition of a common law trust claim.
- The Canadian Bar Association Sections recommend that sections 41 and 49(1) of the Bill be amended to either acknowledge the priority of the *Indian Act* or to expressly override the applicable *Indian Act* provisions.
- The Canadian Bar Association Sections recommend that section 51 and Bill S-4 as a whole be reviewed to consider discrepancies in access to justice, particularly for remote First Nation communities. After review, basic standards such as evidentiary thresholds should be articulated to ensure the proposed legislative scheme applies as consistently as possible across Canada.