

**BILL C-47: 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**

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LEGISLATIVE HISTORY OF BILL C-47

HOUSE OF COMMONS

Bill Stage	Date
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First Reading: 4 March 2008

Second Reading: 15 May 2008

Committee Report:

Report Stage:

Third Reading:

SENATE

Bill Stage	Date
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First Reading:

Second Reading:

Committee Report:

Report Stage:

Third Reading:

Royal Assent:

Statutes of Canada

This bill did not become law before the 39th Parliament ended on 7 September 2008.

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative history by Michel Bédard

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HOMES SITUATED ON FIRST NATION RESERVES
AND MATRIMONIAL INTERESTS OR RIGHTS
IN OR TO STRUCTURES AND LANDS SITUATED
ON THOSE RESERVES^{*}

Bill C-47, 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 (the Family Homes on Reserves and Matrimonial Interests or Rights Act) was introduced in the House of Commons on 4 March 2008. The bill addresses issues relating to family real property on reserves by providing that a First Nation has the power to enact laws relating to “the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves” (clause 7(1)). Where a First Nation does not have such laws in force, whether established under the bill, under the *First Nations Land Management Act*, or under a self-government agreement, provisional federal rules established in the bill will apply.

BACKGROUND

A. Context

When married couples divorce, the division of matrimonial property, both real (e.g., land and houses) and personal is determined in accordance with provincial laws, as a result of subsection 92(13) of the *Constitution Act, 1867*. However, as a result of subsection 91(24) of that Act, which specifies that the Parliament of Canada has exclusive legislative

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

authority with respect to “Indians and Lands reserved for the Indians,” provincial laws do not apply to the division of real property on reserve lands. In *Derrickson v. Derrickson*,⁽¹⁾ the Supreme Court of Canada stated that courts cannot rely on provincial law to order the division of matrimonial real property on reserves.

The historical absence of provisions in the federal *Indian Act* or elsewhere governing the division of matrimonial real property on reserves has resulted in what is often referred to as a legislative gap. Consequently, people residing on reserves have not been able to use the Canadian legal system to resolve matters concerning the division of real property after the breakdown of conjugal relationships.⁽²⁾

Numerous domestic and international reports have referred to the matter, including reports from the United Nations.⁽³⁾ All have recommended that Canada take steps to resolve the issue.

B. Parliamentary Review of the Issue

The matrimonial real property on reserves issue has been examined by several parliamentary committees.

In its November 2003 interim report, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*,⁽⁴⁾ the Standing Senate Committee on Human Rights’ recommendations focused on amending the *Indian Act* to allow for the application of provincial and territorial matrimonial property laws on reserves. That Committee’s recommendations highlighted the

(1) [1986] 1 S.C.R. 285.

(2) More recently, some First Nations have established, or have attempted to establish, matrimonial real property regimes. For example, First Nations that are governed by the *First Nations Land Management Act*, S.C. 1999, c. 24, must establish matrimonial real property laws. Other First Nations have included provisions in their housing policies or created by-laws that address the issue, but these by-laws were disallowed by the Department of Indian Affairs and Northern Development on the basis that they exceeded the by-law authority set out in the *Indian Act*.

(3) As of 20 April 2008, the most recent United Nations reference to the issue is found in the “List of issues and questions with regard to the consideration of periodic reports: Canada” of the United Nations Committee on the Elimination of Discrimination Against Women, (CEDAW) C/CAN/Q/7, 6 March 2008. The Committee requested an update on the proposed consultations relating to matrimonial real property that had been described in Canada’s June 2006 report to the Committee. The Committee also inquired whether a legislative proposal had been developed.

(4) Standing Senate Committee on Human Rights, Interim Report, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*, November 2003,
<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf>.

need for those amendments to, among other things: (1) recognize First Nations measures already in place that address the issue; (2) take into account the rights of children; and (3) recognize rights of occupancy in certain circumstances.

The House of Commons Standing Committee on Aboriginal Affairs and Northern Development reported on the issue in June 2005. In its report, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*,⁽⁵⁾ that Committee echoed the Standing Senate Committee's view that legislative change was needed, recommending the immediate drafting of either interim stand-alone legislation or amendments to the *Indian Act* to make provincial/territorial matrimonial property laws apply to real property on reserves. That Committee noted that such legislation should, among other things: (1) recognize First Nations' inherent jurisdiction with respect to matrimonial real property; (2) authorize First Nations to enact their own matrimonial real property regimes; and (3) contain a non-derogation clause.

Finally, the House of Commons Standing Committee on the Status of Women reviewed the issue in May 2006.⁽⁶⁾ To move the issue forward, that Committee recommended that a high-level committee be established to develop a range of solutions, including legislative ones, to be used in national consultations on the issue.

C. The Federal Initiative

1. Consultations

On 20 June 2006, the Honourable Jim Prentice, then Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, announced that nation-wide consultations would be held on the issue of matrimonial real property (MRP) on reserves, and that Wendy Grant-John had been appointed as his Ministerial Representative to assist with the consultation process.⁽⁷⁾ The objectives of the Ministerial Representative's mandate were as follows:

(5) Standing Committee on Aboriginal Affairs and Northern Development, Fifth Report, June 2005, <http://cmte.parl.gc.ca/Content/HOC/committee/381/aano/reports/rp1906551/aanorp05/aanorp05-e.pdf>.

(6) House of Commons Standing Committee on the Status of Women, Seventh Report, *Matrimonial Real Property on Reserves*, <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10477&Lang=1&SourceId=149986>.

(7) Indian and Northern Affairs Canada, "Minister Prentice Announces Consultations Process for Aboriginal Women," News release, 20 June 2006, http://www.ainc-inac.gc.ca/nr/prs/m-a2006/2-02766_e.html.

1. To ensure appropriate consultations on the issue of MRP, including conformity to *Haida* case law principles⁽⁸⁾ and concerns with the consultation process and how best to facilitate a process that includes the AFN [Assembly of First Nations], NWAC [Native Women's Association of Canada] and INAC [Indian and Northern Affairs Canada].
2. To identify the best viable legislative solution to ensure that:
 - First Nations women's rights are considered and the Canadian Charter of Rights and Freedoms and human rights are respected;
 - There is harmonization with provincial/territorial legislation (as required);
 - There is an acceptable balance between individual equality rights guaranteed by ss. 15 and 28 of the Charter and collective rights recognized in s. 35 of the *Constitution Act, 1982* and referenced in s. 25 of the Charter.⁽⁹⁾

The consultation process consisted of a planning phase (June 2006), a consultation phase (September 2006 to January 2007), and a consensus-building phase (February 2007). As the Ministerial Representative described in her report, "the ultimate goal of the three-phased process was to explore the potential for jointly developing legislative and non-legislative options to address matrimonial real property issues on reserves."⁽¹⁰⁾

(8) "The following principles developed from *Haida* are to help guide consultations, to ensure that the Government of Canada engages in effective and efficient consultations with Aboriginal peoples:

- Reconciliation: Consultation with Aboriginal peoples, guided by the overarching principle of reconciliation, will be grounded in the honour of the Crown, the renewal of the relationship between the Crown and Aboriginal peoples and the balancing of Aboriginal and non-Aboriginal interests.
- Shared Commitment: Consultation will be based on a commitment to cultivate a climate of good faith, mutual respect, reciprocal responsibility, and efficiency.
- Sound Decision Making: The consultation process will ensure that the results of meaningful consultation are sustainable.
- Transparency: Effective and efficient consultations must be timely, accessible, inclusive of all potential stakeholders, and be based on clear, open, two-way communication, and accountability."

(Report of the Ministerial Representative Matrimonial Real Property Issues on Reserve, 9 March 2007, Appendix A, "Mandate of Ministerial Representative Matrimonial Real Property on Reserves," http://www.ainc-inac.gc.ca/wige/rmr/rmr_e.pdf.)

(9) Ibid.

(10) Ibid., para. 2, http://www.ainc-inac.gc.ca/wige/rmr/rmr_e.pdf.

During the planning phase, the Ministerial Representative “worked with the AFN, NWAC and INAC to develop guidelines for discussion between the three organizations about their perspectives and concerns regarding matrimonial real property issues on reserves.”⁽¹¹⁾

During the actual consultation phase, INAC put forward the following three options for consideration:

1. “Incorporation of provincial/territorial matrimonial real property laws on reserves through amendments to the *Indian Act* or stand-alone federal legislation;
2. Option 1 (above), combined with the recognition of a First Nation jurisdiction with regard to matrimonial real property; and
3. Substantive federal matrimonial real property law combined with the recognition of a First Nation jurisdiction with regard to matrimonial real property.”⁽¹²⁾

The NWAC facilitated discussions with Aboriginal women on and off reserves while the AFN discussed the issue during eight regional sessions. Both organizations used other means, including an online survey and a toll-free line to enable participation. INAC consulted with provinces and territories as well as “other interested organizations and communities not represented by either Assembly of First Nations or Native Women’s Association of Canada.”⁽¹³⁾

According to INAC, “the Crown’s consultations process was comprehensive.”⁽¹⁴⁾

2. The Report of the Ministerial Representative

a. General Observations and Conclusions

In her Report, the Ministerial Representative noted that while there had not been sufficient time to reach consensus, “progress was made towards shaping a consensus through substantive discussions of many important policy issues and concerns.”⁽¹⁵⁾ However, she stressed that concerns about the consultation process were central to many of the discussions held, including whether there was a duty to consult, and whether that duty had been discharged.

(11) Indian and Northern Affairs Canada, “Backgrounder,” http://www.ainc-inac.gc.ca/wige/mrp/cnp_e.html.

(12) Indian and Northern Affairs Canada, “Consultation Process,” http://www.ainc-inac.gc.ca/wige/mrp/ipn2_e.html.

(13) Indian and Northern Affairs Canada, Backgrounder.

(14) Indian and Northern Affairs Canada, “Consultations,” http://www.ainc-inac.gc.ca/wige/mrp/cnl_e.html.

(15) Report of the Ministerial Representative (2007), para. 205.

Noting that the federal government has yet to develop a consultation policy to be used in situations such as this, the Ministerial Representative recommended that “efforts be made to address this large gap in federal policy as soon as possible ... includ[ing] developing a companion set of practices and procedures for monitoring, recording and assessing concerns about consultations made by First Nation representatives throughout the process.”⁽¹⁶⁾

Other concerns raised during the consultations related to the need for and/or usefulness of a legislative response to the issue. Such concerns included the difficulty in accessing courts (particularly family courts), the difficulty in enforcing court orders on reserves, the severe housing shortage on reserves, and the need for resources to implement any proposed solution.

With respect to the three options proposed by INAC, the Ministerial Representative noted that participants overwhelmingly rejected any application of provincial laws, which negated Options 1 and 2.⁽¹⁷⁾ With respect to Option 3, she noted that it was not clear whether recognizing First Nations’ inherent jurisdiction, as opposed to delegating federal authority, was a possibility, but that “delegated powers would not be acceptable and First Nations are looking for a clear recognition of First Nations’ jurisdiction.”⁽¹⁸⁾

The Ministerial Representative also emphasized the need for the matrimonial real property project “to be part of the larger ongoing process of reconciliation.”⁽¹⁹⁾

b. The Proposed Legislative Framework

The Ministerial Representative proposed establishing new stand-alone legislation, which would require consequential amendments to other acts. This legislation would be in two parts: Part 1 would recognize First Nations’ jurisdiction over the issue, and Part 2 would establish interim federal rules that apply until such time as a First Nation has exercised its jurisdiction and adopted its own laws.

Key components of the Ministerial Representative’s proposed legislative framework include the following:

(16) Ibid., para. 184.

(17) Ibid., para 154.

(18) Ibid., para. 156.

(19) Ibid., para 285.

- a Preamble, which would set out key principles, such as the need to be consistent with fundamental human rights principles, the need to provide immediate interim federal measures, the need to recognize First Nation jurisdiction over the issue, and the priority interests of children;⁽²⁰⁾
- defining to whom the Act applies (First Nations under FNLMA to be excluded, couples married under custom or provincial law and common-law partners to be included⁽²¹⁾);
- providing for a review of the Act and its implementation;⁽²²⁾
- protecting married spouses from having the matrimonial home sold without their knowledge or consent;⁽²³⁾
- allowing for the temporary exclusive possession of the matrimonial home in urgent and other situations;⁽²⁴⁾
- authorizing courts of competent jurisdiction to grant applications for compensation orders relating to the value of the matrimonial home;⁽²⁵⁾ and
- authorizing courts to develop new interim remedies that may better reflect First Nations diversity and legal traditions.⁽²⁶⁾

DESCRIPTION AND ANALYSIS

Bill C-47 contains a preamble and 60 clauses. The following section provides a summary overview of selected clauses contained in the bill.

A. Preamble

The preamble notes the necessity of addressing certain family law matters on reserve, and highlights the need for decision-makers to consider, among other things, the best interests of the child, including the interest of any child who is a First Nation member to

(20) Ibid., para. 237.

(21) Ibid., para. 239.

(22) Ibid., para. 242.

(23) Ibid., para. 248.

(24) Ibid., para. 249.

(25) Ibid., para. 251.

(26) Ibid., para. 263.

maintain a connection with that First Nation. It also notes the role of First Nations in informing judicial decision-makers of the cultural, social and legal context of a case.

B. Definitions

A number of terms have particular significance in the context of the bill. “Court,” unless otherwise indicated, means:

- (a) for the Province of Ontario, the Superior Court of Justice,
 - (a.1) for the Province of Prince Edward Island or Newfoundland, the trial division of the Supreme Court of the Province,
- (b) for the Province of Quebec, the Superior Court,
- (c) for the Provinces of Nova Scotia and British Columbia, the Supreme Court of the Province,
- (d) for the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Queen’s Bench for the Province, and
- (e) for Yukon or the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice.⁽²⁷⁾

A “designated judge” refers to a justice of the peace appointed by the lieutenant governor in council of the province, a judge of the court in the province or a judge of a court established under the laws of the province. “Family home” means a structure situated on reserve land (but not necessarily affixed to land) where spouses or common-law partners either habitually reside or, if they have ceased to cohabit or one of them has died, where they had habitually resided.

The bill distinguishes between categories of property rights. Under the bill, “interest or right” means interests in or to reserve land pursuant to the *Indian Act* and other specified instruments, as well as interests in or to a structure on reserve land that are recognized by the First Nation or by court order. “Matrimonial interest or rights” means interests – excluding those in the family home – held by one or both conjugal partners that were acquired during, in contemplation of, or that appreciated in value during, the conjugal relationship.

(27) *Divorce Act*, 1985, c. 3 (2nd Supplement), ss. 2(1).

C. Purpose and Application (clauses 4 to 6)

Clause 4 establishes the purpose of the bill as “providing for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner.” The laws or provisional rules address the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by the spouses or common-law partners in or to structures and lands on reserves in the aforementioned circumstances.

Clause 5 confirms that the bill does not affect title to reserve lands, and that reserve lands continue to be (1) set apart for the use and benefit of the First Nation and (2) lands reserved for the Indians within the meaning of section 91(24) of the *Constitution Act, 1867*.

Clause 6 states that the bill applies only where at least one of the spouses or common-law partners is a First Nation member or an Indian.

D. Enactment of First Nation Laws (clauses 7 to 16)

Clauses 7 to 16 describe the process involved in establishing First Nation laws relating to “the use, occupation and possession of family homes and the division of the value of interests or rights held by spouses or common-law partners in or to structures and lands on its reserves” (clause 7(1)). The proposed laws must be submitted to the First Nation’s members for approval (clauses 11 to 14), and along with an organization to be designated by the Minister of Indian Affairs and Northern Development, a First Nation must appoint a verification officer to monitor and certify the approval process (clauses 9, 10 and 15). Assuming that the required membership approval is attained (a minimum of 25% of eligible voters), the First Nation laws come into force when the certification relating to the conduct of the community approval process is issued by the verification officer (clause 16(1)).

E. Provisional Federal Rules (clauses 17 to 56)

Clause 17(1) clarifies that the provisional federal rules apply only to a First Nation that has not enacted its own laws under clause 7, and apply only to a First Nation subject to the *First Nations Land Management Act* or to a self-government if its own legal regime related to conjugal real property is not in force.

1. Family Home (clauses 18 to 32)

Clauses 18 to 32 relate to the occupation of the family home. They provide spouses or common-law partners, whether or not they are First Nation members or Indians, with rights of occupancy during the conjugal relationship (clause 18) and after the death of a spouse or common-law partner (clause 19). In situations of family violence, emergency protection orders can be obtained from a designated judge; such orders can require, among other things, that the applicant's spouse or common-law partner vacate the home for up to 90 days (clauses 21 to 24). Individuals can also apply for a court order awarding exclusive occupation of the family home for a prescribed period, whether or not they are First Nation members or Indians (clause 25, and in the case of survivor spouses or common-law partners, clause 26). In the latter case, the court is required to consider a number of matters, including representations by the First Nations council. Neither emergency protection orders nor exclusive occupation orders alter the interests or rights held in or to the family home (clause 28).

2. Division of the Value of Matrimonial
Interests or Rights (clauses 33 to 45)

Clauses 33 to 45 establish the regime for the division of matrimonial interests or rights on the breakdown of the conjugal relationship (clauses 33 to 38) and on the death of a spouse or common-law partner (clauses 39 to 45). In both situations, the calculation of the entitlement amount depends on whether or not a spouse or common-law partner is a member of the First Nation on whose reserve the property is situated (clauses 33(2) and 33(3); clauses 39(2) and 39(3)). The calculation of the division of matrimonial rights or interests on the breakdown of the relationship or on the death of a spouse or common-law partner is not set in stone, as a person can apply to a court for a variation of the distribution on the grounds that the legislated distribution is unconscionable in their particular set of circumstances (clause 34; clause 40). In addition to applying for a variation of the distribution amount, a spouse or common-law partner can apply for a court order determining the amount payable by one spouse or common-law partner to the other, and determining how the amount payable is to be settled (clause 35). A court can also, on application by a spouse or common-law partner, make any order necessary to restrain the improvident depletion of an interest or right (clause 37).

In the case of an applicant spouse or common-law partner who is a First Nation member, a court can also order that certain interests or rights to land or structures be transferred to them (clause 36).

3. Notice to Council [of a First Nation]
and Views of Council (clauses 46 and 47)

With the exception of applications for emergency protection orders and applications for orders relating to confidentiality, courts are required to allow the council of a First Nation on whose reserve the affected lands and structures are located “to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made” (clause 46(2)).

F. Jurisdiction of Courts (clauses 48 to 50),
Rules of Practice and Procedure (clause 51),
Other Provisions (clauses 52 to 56),
Regulations (clause 57),
Transitional Provisions (clauses 58 and 59)
and Coming Into Force (clause 60)

For the most part, clauses 48 to 60 relate to procedural, administrative and logistical aspects of the bill. Clauses 48 and 49 determine which courts have jurisdiction in particular circumstances, while clause 51 articulates the rules that can be made respecting proceedings under the bill.

Clause 52 provides that, for the purposes of the bill, a court may, on application, determine whether a spouse, common-law partner or survivor holds interests or rights in or to a structure or land situated on a reserve.

Clause 56 relates to the enforcement of orders relating to the amounts payable following the breakdown of a conjugal relationship (clause 35(1)) or the death of a spouse or common-law partner (clause 41(1)). A person who is neither a First Nation member nor an Indian can apply to have the order enforced by the council of a First Nation as if the order had been made in favour of the First Nation (clause 56(1)). However, the council is not bound to enforce the order, and if the council issues notice that it will not enforce the order, or does not enforce it within a reasonable period, a court may, where necessary, allow an application to vary the order to require the person against whom the order was made to pay into court the amount payable (clause 56(2)).

Clause 57 grants the Governor in Council broad discretion to make any regulations it considers necessary for carrying out the purposes and provisions of the bill.

Clause 58(1) establishes that where the provisional federal rules begin to apply to a First Nation, certain provisions also begin to apply to spouses and common-law partners with respect to structures and lands on the reserve of that First Nation. When a First Nation is no longer subject to the provisional rules, clause 58(2) establishes what provisions and proceedings continue to apply in what circumstances.

Clause 59 provides that the provisional federal rules do not apply to a First Nation that is subject to the *First Nations Land Management Act* and that has neither a land code nor conjugal real property laws in force, until three years after the provision comes into force.

Finally, with the exception of the transitional provisions, the bill comes into force on a day or days to be fixed by order of the Governor in Council (clause 60).

COMMENTARY

Reaction to the bill by Aboriginal organizations has been mixed. The Native Women's Association of Canada (NWAC) has stated that it does not support the bill, and that "[t]he Government of Canada has acted unilaterally in trying to resolve the issue." According to NWAC, "nonlegislative solutions are necessary to make the rights in the legislation real for communities."⁽²⁸⁾

Quebec Native Women Inc., while supporting the idea of legislation in principle, has expressed the concern that C-47 does not address the housing shortage on reserves, and requests that meaningful consultation occur before the legislation is passed. The organization cautions "against PanAboriginal legislation since the over 600 Aboriginal communities in Canada contain a diverse crosssection of traditional and cultural realities and an all-encompassing legislation cannot meet the specific needs of each Nation or community."⁽²⁹⁾

As of 16 April 2008, the Assembly of First Nations (AFN) had not issued a public response to the bill. However, in a 13 February 2008 "Technical Update" on the issue, the AFN noted that they had major concerns with respect to draft legislation that had been proposed.⁽³⁰⁾

(28) Native Women's Association of Canada, "'Consultative Partnership' a Sham," News release, Winnipeg, 4 March 2008, <http://www.nwac-hq.org/en/documents/PressReleasereMRPlegislationMar4-08.pdf>.

(29) Quebec Native Women Inc., "Open Letter to all Members of the Senate and Canadian Political Parties," Kahnawake, 19 March 2008, <http://www.nwac-hq.org/en/documents/C47-openletter-19-03-08.pdf>.

(30) Assembly of First Nations, "Technical Update: Matrimonial Real Property," Ottawa, 13 February 2008, <http://www.afn.ca/misc/mrp-update.pdf>.

At least one Aboriginal organization has expressed support for the bill. The Congress of Aboriginal Peoples (CAP) noted that the legislation “represents a progressive step towards offering First Nations families means of escaping the paternalistic, prescriptive provisions of the Victorian-era *Indian Act*.”⁽³¹⁾

Most media commentary supports the introduction of the legislation, albeit acknowledging in some instances that the issues are complicated and that getting the legislation passed may be difficult.

(31) Congress of Aboriginal Peoples, “CAP Applauds Fairness of Proposed Matrimonial Property Rights Legislation,” News release, Ottawa, 5 March 2008,
http://www.abo-peoples.org/media/current/PR_MRP_Legislation_Mar08.html.