

# MATRIMONIAL REAL PROPERTY CONSULTATIONS

## AN INFORMATION KIT



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# AN OVERVIEW OF THE ISSUES



## Key Information

This overview is provided to matrimonial real property consultation participants so they can gain a better understanding of the issues surrounding matrimonial real property on reserve.

You will find information explaining what matrimonial real property is, along with relating questions that arise when a marriage or relationship ends. The information explains what systems some governments have put in place in an effort to address matrimonial real property issues on reserve.

## Additional Tools

A glossary of terms has been provided at the end of this section to provide clarification on some technical and/or legal terms.

## An Overview of the Issues

This information outlines details of the important matter affecting all couples living on reserves - the need to protect the rights of both spouses to matrimonial property. This is an issue that affects spouses married under provincial law, spouses married in accordance with First Nation custom, as well as spouses in long-term common-law relationships.

Off reserve, there are laws in each province and territory that protect the matrimonial property rights of both spouses in a manner that respects the equality of men and women. This protection is available both during marriage and after a separation. In some provinces and territories, these laws apply equally to married and common-law couples, but in others people in common-law relationships have different rights and protections than people who are formally married.

However, these laws do not fully apply on reserves. This means that couples living on reserve generally have fewer rights and protections respecting matrimonial property than those living off reserve. The following information will explain why this is.

### What is Matrimonial Property?

“Matrimonial Property” is a term that refers to certain things that one or both spouses own or have a right to use. It usually includes property used for a family purpose. It can include items acquired by either or both spouses during a marriage or common-law relationship. The home where the family lives is an example of matrimonial property. Other things that may be matrimonial property are cars, furniture, money in bank accounts and recreational items like a boat.

Each province and territory has a law defining what kinds of things are considered to be matrimonial property.

The family home is a special kind of matrimonial property. The family home is sometimes called “matrimonial real property” or in Québec an “immovable”. “Real property” is a legal term that means property like land, or things attached to the land like a house, that cannot be picked up and moved.

### What does matrimonial property law do?

The breakdown of a marriage or a common law relationship can be a difficult time. There are many decisions to make as each spouse tries to reorganize their life. Questions that can arise are:

- Does one spouse have a legal right to continue living in the family home after separation and can she or he ask the other spouse to leave?
- Should the family home be sold so money from the sale can be divided between the spouses?
- Does each spouse have an equal share in the financial value of the family home?

- How will other property like cars, bank accounts, or furniture be divided between the spouses?

Sometimes spouses have trouble agreeing on such questions. Matrimonial property law can provide answers and resolve disputes when spouses cannot agree.

Laws can also protect the individual rights of spouses during the relationship. For example, off reserve, there are laws that do not allow one spouse to sell the family home without the consent of the other spouse.

### Which governments have responsibility to make matrimonial property law?

In Canada, matrimonial property law is usually made by provincial or territorial governments.

Some First Nations governments also have recognized lawmaking powers over matrimonial property under self-government agreements or under the First Nations Land Management Act.

### Matrimonial Property and the Indian Act

The *Indian Act* still applies to most First Nations in Canada. Unfortunately, the *Indian Act* does not provide any rules to deal with matrimonial property issues on reserves during marriage or after marriage breakdown. It also does not recognize First Nation lawmaking power in relation to matrimonial property matters.

### Do provincial or territorial matrimonial property laws apply on *Indian Act* reserves?

Matrimonial property laws made by provincial or territorial governments only partially apply to *Indian Act* reserves. Provincial / territorial laws do not apply to most questions affecting reserve lands including questions about the family home on reserve.

This means some important rights and protections for spouses are not available on reserves. For example, spouses living on reserves cannot ask a court to make a temporary order of possession of the family home to one spouse.

### Why are matrimonial property rights important?

The way the law operates now does not fully protect the property rights of spouses on reserves. Research has shown that First Nation women are especially harmed by the lack of protection for matrimonial property rights.

Negative impacts on women can also harm the welfare of their children, because women tend to be the primary caregivers or custodial parent of children more often than men.

## Glossary of Terms

Women and children are more often the victims of family violence. The lack of matrimonial property laws can make it difficult for a woman to get a court order for exclusive possession of the family home when it is located on reserve.

All people living on reserve - men, women and children - can be negatively affected by the lack of matrimonial property rights on reserves. Many First Nations people and many human rights experts have said that the current state of matrimonial property rights on reserves is a serious human rights problem. Many people feel that new laws must be made as soon as possible in order to ensure the fair treatment of all spouses, the welfare of children and to respect the equality of men and women on reserves.

Some questions that need to be answered are:

1. What kind of legal protections are needed?
2. Which government should pass laws to fully protect the property rights of each spouse when on reserve?

### Common Law Relationships

A common-law couple, as defined by some provinces and territories, whether opposite-sex or same-sex, is two people who have been living together continuously in a relationship for at least one year.

### Custodial Parent

The parent determined by a legal court, as the primary caregiver.

### Exclusive Possession

Where one person is provided the right to stay in the home.

### First Nation Custom Marriage

A marriage that is obtained by undergoing a traditional ceremony.

### First Nation Government

Is an elected or traditional governing body for a First Nation.

### First Nations Land Management Act

Federal legislation that allows for land management provisions from the *Indian Act* in order to improve their capacities and opportunities for economic development.

### First Nation Law Making Powers

The authority of a First Nation government to make laws that are enforceable within their territory.

### Human Rights

Human rights are those basic standards without which people cannot live in dignity.

### Indian Act

The Indian Act is federal legislation that sets out certain federal government obligations and responsibilities toward First Nations and reserve lands.

### Legal Protections

A law made by a governing body that protects individuals of that territory from harm.

### Matrimonial Real Property

The family home in which both persons in the relationship reside.

### Temporary Possession

Where one person is provided the right to stay in the home for a short term.

### Provincial or Territorial Governments

Is an elected governing body for a Province or Territory.

## Glossary of Terms Con't...

## Notes

### Self Government Agreements

An agreement with the Canadian government that allows a First Nation to make their own decisions about matters related to the preservation and development of their distinctive cultures.

### Separation

When a couple ends their relationship and decide to separate their lives from one another.

### Spouses

Whether the couple is "legally married", in a common law relationship or married by First Nation custom.



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# AN OVERVIEW OF THE SYSTEMS IN PLACE



## Key Information

This overview is provided to matrimonial real property consultation participants so they can gain a better understanding of the current systems that are in place and or have been adopted by certain First Nations to address the issues surrounding matrimonial real property on reserve.

You will find information explaining how the laws in place for Canadian provinces and territories are designed to protect the interests of both people in a relationship. The information also explains the similarities and differences of each province and territory. It also provides some insight to how the Indian Act conflicts with these laws and leaves some spouses on reserve treated unfairly.

This section will also explain how the First Nations Land Management Act is addressing the issues of matrimonial real property on reserve.

This section also explains the different approaches that Self Government Agreements can take in relation to Matrimonial real property.

## Provincial Territorial Matrimonial Property Law

Every province and territory<sup>1</sup> has laws describing the property rights of spouses - both rights that exist during marriage and rights upon marriage breakdown. This kind of law is sometimes called "matrimonial property law"<sup>2</sup>.

During marriage, spouses have an equal right to use and enjoy matrimonial property. Upon marriage breakdown, matrimonial property is usually divided equally between the spouses unless there is a good reason for a different kind of division. These rules usually apply regardless of which spouse owns or has a right to use the property.

Provincial and territorial laws provide special protections for the family home. As a general rule, one spouse cannot sell or give away any part of the family home without the consent of the other spouse. This applies regardless of whether one or both spouses' names are listed on the title or a legal document granting use and occupation.

### Common Features of Provincial/Territorial Matrimonial Property Laws

Matrimonial property laws in each province and territory have some important differences and they have some things in common.

Matrimonial property law as it applies off reserve, generally does the following in each province and territory:

- defines what things are considered matrimonial property;
- applies to spouses automatically upon marriage;
- says whether or not matrimonial property rights apply to common law couples in the same way as married couples;
- describes rights and interests during marriage (or a common law relationship depending on the province or territory);
- describes how to divide matrimonial property upon marriage breakdown;
- provides for the enforcement of agreements regarding matrimonial property;
- provides special rights in regard to the family home.

Off-reserve in each province and territory, spouses can apply to court for decisions and protections relating to matrimonial property such as:

- an order for temporary or permanent possession of the family home (and excluding the other spouse);
- permission to sell the family home in order to divide the sale price between the spouses;
- an order preventing the sale of the family home without the consent of both spouses;
- protection against a spouse unreasonably or wastefully disposing of matrimonial property such as cash in a joint bank account.

## How do Provincial and Territorial Matrimonial Property Laws Differ?

Provinces and territories have taken different approaches on some issues. For example, some have special rules for matrimonial property rights when one spouse dies but others do not.

Some treat the rights of common-law couples the same as married couples, while others only recognize married couples as having matrimonial property rights.

Some provinces and territories have special laws to deal with same-sex relationships.

Some provinces and territories have family violence laws which provide protections respecting the use of matrimonial property in situations of family violence.

## Matrimonial Property Issues under the Indian Act

### Reserve Land Allotments and Division of Matrimonial Property

In 1986, the Supreme Court of Canada decided two cases that show that provincial matrimonial property law does not fully apply on *Indian Act* reserves. These two cases are still the law today for reserves subject to the *Indian Act*.

In *Derrickson v. Derrickson*, the spouses were divorcing after many years of marriage. The couple had acquired various kinds of property during the marriage. This included individual allotments of reserve land on the Westbank Indian Reserve. Each of them held portions of reserve land by Certificates of Possession.

Certificates of Possession are documents issued under the *Indian Act*. A Certificate of Possession can be issued when a band council gives a member the right to use and occupy a specific parcel of reserve land. (Many First Nations in Canada do not make land allotments to their members by Certificate of Possession. Instead individual allotments are made by council by a "custom" method of allotment, meaning one that does not follow the *Indian Act* allotment rules.)

As part of the legal process of dividing all the property they owned individually and together, Mrs. Derrickson claimed certain property rights as a spouse.

First of all, Mrs. Derrickson said the reserve land allotments held by her husband should be considered matrimonial property, meaning it should be considered part of all the property to be divided between the divorcing spouses. She also asked the court to say that she had a half interest in these parcels of reserve land. She asked the court to make this decision by applying provincial matrimonial property law. However, the Supreme Court of Canada said provincial law could not be applied to change the property interest Mr. Derrickson had to the land under the *Indian Act*. As a result, the court did not have the authority to declare that Mrs. Derrickson had a half interest in the reserve land allotments held under her husband's name.



Mrs. Derrickson asked for an alternative decision if she could not have a half interest in the reserve land itself. The other thing Mrs. Derrickson asked the court to do, was to make a court order that would require her husband to pay her a sum of money equal to one-half of the value of the reserve land allotments held by her husband. The Supreme Court of Canada said it could make this order. The reason was that such a court order for one spouse to pay the other a sum of money did not change any individual property rights in reserve land recognized by the *Indian Act*.

It should be noted however that it is often difficult to enforce a compensation order on reserve. This is because courts do not have the power to order the sale of home on reserve - even to other band members - in order to get the money needed to pay out the compensation order.

### Paul v. Paul - Temporary Orders of Possession of a Family Home

Another important matrimonial property case dealing with *Indian Act* reserve lands is the 1986 decision in *Paul v. Paul*<sup>3</sup>. In this case, Mrs. Paul asked the court for an order granting her "interim" (temporary) order of exclusive possession of the family home following the breakdown of her 16 year marriage. An order for "exclusive possession" allows one spouse to live in the family home and to keep the other spouse out for a specified time period.

Off reserve, a spouse will often apply for this right on a temporary basis. Temporary exclusive possession allows a spouse time to reorganize his or her life as a single person without having to live with the other spouse. Mrs. Paul wanted exclusive possession of the family home on reserve, as she was caring for the couple's three children.

Unfortunately, the court did not have the power to grant her request because the home was located on reserve lands. The Supreme Court of Canada used the same reasoning used in the *Derrickson* case. It said that provincial law could not be used to grant an order for interim possession of a matrimonial home situated on reserve.

### Domestic Violence Legislation

Several provinces and territories have adopted legislation to provide legal protection on an emergency basis to victims of domestic violence. A common remedy provided by domestic violence legislation is interim exclusive possession of family home. This allows a victim of family violence to occupy the family home to the exclusion of an abusive family member.

It is possible that the legal reasoning used in the *Derrickson* and *Paul* cases may mean that some protections regarding the family home under provincial domestic violence legislation are also not available on reserve<sup>4</sup>.

### Conclusion

Some important decisions made by the Supreme Court of Canada show that certain types of court orders are not available on reserve to deal with matrimonial property, such as:

- orders to stop a spouse from selling or giving away the right to occupy a land allotment without the consent of his or her spouse;

- orders to grant an interim or permanent possession of the family home to the exclusion of the other spouse;
- court orders requiring the sale of the family home for the purpose of fairly dividing matrimonial property.

This situation is sometimes described as a "gap" in the law - meaning that there is no applicable federal, provincial or First Nation matrimonial property law. This situation can negatively affect the well-being of couples and their children on reserves.

This raises the important question - what should be done to fully provide matrimonial property rights on reserves?

First Nations and the federal government need to consult with First Nation people and to discuss how to ensure matrimonial property rights are fully protected on reserves.

## Matrimonial Property and the First Nations Land Management Act

### Background

The *First Nations Land Management Act* (FNLMA) is a federal law enacted in 1999. The main purpose of the *First Nations Land Management Act* is to recognize the powers of First Nations to make laws regarding reserve land matters.

The FNLMA ratifies a 1996 *Framework Agreement on First Nations Land Management* (Framework Agreement). This agreement was originally made with 14 First Nations. Signing the Framework Agreement is the first step to having the *First Nations Land Management Act* apply to a First Nation.

Since 1999, over 40 [check figure] First Nations, in addition to the original 14, have signed onto the Framework Agreement. This enables these First Nations to operate under the *First Nations Land Management Act*.

Once the FNLMA applies to a First Nation, the *Indian Act* provisions relating to land management no longer apply to the reserve lands of the First Nation.

First Nations have greater powers over their reserve lands under the *First Nations Land Management Act* than what is recognized under the *Indian Act*. For example, First Nations can create their own system for making reserve land allotments to individual band members. First Nations also have recognized powers in relation to matrimonial real property.

Under the *First Nations Land Management Act*, First Nations assume an obligation to enact rules and procedures "in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land". In other words, First Nations commit themselves to make rules respecting the division of "matrimonial real property".

## Making Matrimonial Real Property Law

There are several steps required under the FNLMA for First Nations to develop rules and procedures on matrimonial real property for their reserve lands. Some key ones are listed below:

### Step 1

Develop a general land code applicable to all reserve lands of the First Nation and subject it to community approval (the general land code must meet certain requirements set out in the *First Nations Land Management Act*)

### Step 2

Develop a community consultation process to develop rules and procedures for matrimonial real property

### Step 3

Within 12 months of the general land code coming into effect, develop and enact the rules and procedures for matrimonial real property in accordance with the *First Nations Land Management Act*.

## Matrimonial Real Property Laws - No Discrimination on grounds of sex

First Nation laws regarding matrimonial real property may not discriminate on the grounds of sex (s. 54 of the Framework Agreement).

In addition, the *Canadian Human Rights Act* applies to decisions and laws made under the FNLMA.

## What has been done so far regarding matrimonial real property under the FNLMA?

Several First Nations have adopted matrimonial real property laws under the FNLMA, including:

- Georgina Island First Nation (Ontario);
- Lheidli T'enneh First Nation (British Columbia);
- Muskoday First Nation (Saskatchewan);
- Scugog Island First Nation (Ontario); and,
- Beecher Bay First Nation (British Columbia).

Some First Nations are overdue in meeting their commitment to develop their matrimonial real property laws.

So far, the matrimonial real property laws adopted by First Nations under the FNLMA have been quite similar to one another. These First Nation laws often make rules such as the following:

- Spouses may make their own agreement on how to divide their matrimonial real property on marriage breakdown.

- Where spouses cannot reach an agreement on the division of their matrimonial property, they must attend mediation (mediation is a process where parties to a disagreement try to find a solution with the help of a “mediator” (a mediator is a neutral person trained in conflict resolution)).
- If the spouses still cannot agree after going through mediation, they may go to court and have their issues resolved using provincial family law.
- Courts may make interim possession orders regarding the family home in favour of one of the spouses, including non-member spouses.
- Court orders relating to absolute transfers of property may only be made to band members.

## Other matters addressed in some First Nation matrimonial real property laws are:

- extending First Nation matrimonial real property law to spouses married by tradition/custom as well as common-law spouses.
- defining “spouse” - some define “spouses” as a “man and woman”, while others refer to “individuals”
- allow a spouse to go to court regarding some matrimonial property issues when their spouse dies.

## Matrimonial Property and Self-Government Agreements

Self-government negotiations provide an opportunity for the recognition of First Nations jurisdiction in some areas of family law. Matrimonial property is an area of family law that can be addressed by self-government agreements.

### Three Approaches to Matrimonial Property

Many self-government agreements have been negotiated between Canada and First Nations.

Matrimonial property is an issue that needs to be discussed in any negotiations involving jurisdiction over First Nation lands.

Three approaches to the treatment of matrimonial property are evident in agreements negotiated so far. Each is intended to ensure that the responsibility for making matrimonial property laws is clear.

### Approach 1

First Nation has jurisdiction over all matrimonial property matters on First Nation lands

### Approach 2

Shared jurisdiction over matrimonial property (shared between the First Nation and a provincial or territorial government)

### Approach 3

Full application of provincial/territorial matrimonial property laws.

## First Nation Jurisdiction over All Matrimonial Property

Under this approach to self-government and matrimonial property, a First Nation assumes lawmaking responsibility for all matters relating matrimonial property on First Nation lands.

Sometimes these agreements require that the Aboriginal government provide rights and protections "equivalent" or "comparable" to those available under provincial/territorial law. The Meadow Lake First Nations Government Final Agreement is an example of this approach.

### Shared Jurisdiction

Under this approach, provincial and First Nation governments share jurisdiction over matrimonial property law. The First Nation has recognized jurisdiction over matrimonial real property only (property such as a home on a reserve land allotment). An example of this approach includes Westbank First Nations Self-Government Agreement.

Provincial law continues to apply over other matrimonial property matters, as it did prior to self-government. This means for example that the rules for defining and dividing matrimonial property would be determined by provincial.

### Full Application of Provincial/Territorial Matrimonial Property Law

Under this approach, a self-government agreement provides that certain provincial laws that include matrimonial property, will fully apply to First Nation lands upon a specified date. The Nisga'a Final Agreement is an example of this approach.

This result is achieved through provisions addressing how provincial, federal and First Nation laws will apply on First Nation lands after the self-government agreement comes into effect.

This approach is often used in agreements where the First Nation lands will not have legal status as reserve lands (under section 91(24) of the Constitution Act, 1867).

### Treatment of Section 89 of the Indian Act

Section 89 of the Indian Act restricts the use of legal processes for the seizure or "attachment" of property located on reserves belonging to "Indians" and band members<sup>5</sup>. This can affect the enforcement of court orders (e.g., compensation orders or orders for equalization). Some self-government agreements talk about whether such restrictions will continue in the future.

## First Nation Initiatives Addressing MRP Interests

Under the Indian Act, band councils do not have the authority to adopt by-laws dealing with the issue of matrimonial real property. Despite this, there are some First Nations who have undertaken their own initiatives to address matrimonial property issues. Some have used their housing policies and others have make laws enacted outside the authority of the Indian Act. Some of these initiatives are described below.

### First Nations Housing Policies

When a marriage breaks down, one or both spouses may need to look for a new home. This can have an impact on housing needs on reserves.

First Nations are not obligated by law or by federal policy to adopt housing policies that specifically address situations of marital breakdown. Nevertheless, some First Nations have considered the consequences of marriage breakdowns on housing needs when developing their housing policies.

Two examples are the Mistawasis First Nation Housing Policy and the Squamish Nation Housing Policy.

The Mistawasis First Nation Housing Policy<sup>6</sup> says that in cases of conflict or separation of a common-law union or marriage, "the title of ownership of a Band and/or CMHC [Canada Mortgage and Housing Corporation] unit shall be made to that spouse which shall have the greatest need for the said unit in the opinion of the Housing Authority<sup>7</sup>."

The Squamish Nation Housing Policy<sup>8</sup> establishes a housing list with four categories: single, single parent, married/common-law, and pensioner. The council of the First Nation determines how many housing units will be allocated each year to each category.

As a general rule, after receiving a house, a member cannot reapply for another house, subject to certain exceptions. One exception is persons who have experienced a marital breakdown<sup>9</sup>.

The policy defines the term "spouse" in a way that includes "married persons who are not separated, persons united by traditional laws and customs of the Squamish Nation and persons in common-law and same sex relationships of at least two years."<sup>10</sup>

The Squamish Nation Housing Policy also addresses the interests of non-member spouses. While persons who are not members of the Squamish Nation generally have no legal interests or rights in any residence or lot, there are special rules for non-member former spouses who are primary caregivers of minor children or dependent adults. In such cases, the non-member former spouse is entitled to remain in the on-reserve residence until the minor children or dependent adults are able to care for themselves or no longer reside with the non-member former spouse<sup>11</sup>. Apart from these situations, a non-member former spouse must vacate the residence within three months of the dissolution of the marriage or relationship.<sup>12</sup>

Some First Nations have taken the initiative to make their own matrimonial property laws, even though the Indian Act does not recognize bylaw authority in this area.

For example, the Ojibways of Sucker Creek First Nation have drafted the Ojibways of Sucker Creek First Nation Matrimonial Real Property Law. This by-law is reported to have been accepted by the community through a referendum process. However, because of the current state of the Indian Act, the Minister of Indian Affairs could not approve it.

The Sucker Creek First Nation matrimonial real property law does the following things:

- applies to common-law couples of the opposite sex but aims to exclude same-sex couples;
- says that spouses can make contracts to settle their matrimonial real property rights;
- requires spouses to go to mediation (at their own cost) if they cannot reach an agreement on their own respecting matrimonial real property;
- where mediation fails, provincial family laws apply.

The Little Pine First Nation in Saskatchewan has also developed matrimonial property law as part of a law relating to housing and land. The Little Pine First Nation Housing Act (By-Law No. H-1) is very complex and detailed. The Minister of Indian Affairs was required to say that this law was not within the authority of the First Nation under the Indian Act.

### Endnotes:

1. Provinces have adopted these laws pursuant to their legislative power on property and civil rights in the province found under section 92 (13) of the Constitution Act, 1867. Territories have enacted these laws pursuant to the power to legislate on property and civil rights and matters of a local and private nature that has been granted to them by Parliament.
2. A list of provincial/territorial laws on matrimonial property is provided in Annex A. The term used to describe this type of property varies by jurisdiction e.g. "matrimonial property", "marital property", "family property", "family assets", etc.
3. Paul v. Paul
4. Although there has not been any case law specifically dealing with the applicability of such legislation to reserve lands, the legal principles found in *Derrickson v. Derrickson* and *Paul v. Paul* cases, supra note 1, may also apply to preclude the application of such legislation as it relate to real property interests.
5. Section 4.1 of the Indian Act.
6. Mistawasis First Nation #103 Housing Policy, online: Mistawasis First Nation <[http://www.mistawasis.ca/publicworks/housing\\_policy.htm](http://www.mistawasis.ca/publicworks/housing_policy.htm)>.
7. Ibid. in the section entitled: "Marriage Conflicts" (unnumbered section).
8. Squamish Nation Housing Policy (approved October 10, 2001 and revised February 12, 2003), online: Squamish Nation Network <[http://www.squamish.net/PDF/news/bulletins/Housing\\_Policy.pdf](http://www.squamish.net/PDF/news/bulletins/Housing_Policy.pdf)>.
9. Ibid., article 3.3(b).
10. Ibid., article 1.2 (w) and (kk).
11. Ibid., article 13.4 (a) (l).
12. Ibid., article 13.4 (b).



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# CONSIDERATIONS AND REVIEWS OF THE ISSUE



## Matrimonial Property Issues on Reserves - Overview of Expert Reports & Studies

Most First Nation reserves are still subject to the Indian Act on matters relating to reserve lands. Unfortunately, the Indian Act does not make any provisions to deal with the individual property rights of spouses during marriage or upon breakdown of a relationship. This means there is often a lack of rules to deal with questions like what should happen to the family home, when spouses separate.

This is a serious issue affecting many families on reserves. Many experts and government bodies have expressed concerns about the lack of matrimonial property rights on reserves.

In recent years, there have been reports and studies by First Nation women's organizations, commissions of inquiry, parliamentary committees, and human rights experts.

In general, all of these reports suggest that new laws are urgently needed to address matrimonial property issues on reserves. There is general agreement that the well-being of women and children on reserves is especially at risk under the current state of the law.

There is also recognition that First Nations and the Government of Canada need to work together along with First Nation women to develop and improve the law in this area.

## Canadian Studies & Reports

There are several Canadian studies and reports on matrimonial property issues on reserves.

The Report of the Aboriginal Justice Inquiry of Manitoba (1991) recommended that the Indian Act be amended to address matrimonial real property issues on reserves<sup>1</sup>.

In 1997, the Royal Commission on Aboriginal Peoples (RCAP) made several recommendations:

- that federal, provincial and territorial governments promptly acknowledge that “the field of family law is generally a core area of Aboriginal self-governing jurisdiction”;
- that First Nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements;
- that Aboriginal nations consult with federal, provincial and territorial governments on making legislative amendments to resolve issues in the application of family law to Aboriginal people.

The Standing Senate Committee on Human Rights studied the issue in a report entitled *A Hard Bed To Lie In: Matrimonial Real Property On Reserve* (2003). This Senate Committee made several recommendations including:

- The Indian Act should be amended so that provincial/territorial laws respecting matrimonial property can apply on reserve
- Changes should take into account measures First Nations may already have in place respecting matrimonial property
- First Nations should be able to continue to follow their own rules so long as they provide protection at least equal to that available under provincial law
- Any changes to the Indian Act should take into account the rights of children, including their right to continue to live in their community
- The Indian Act should be amended to recognize a right of occupancy of a residence for spouses whose name does not appear on the Certificate of Possession or when the Certificate of Possession is held by a third party.

The Final Report from the Commission on First Nations and Métis Peoples and Justice Reform, Saskatchewan (2004) expressed concern about the limited application of Saskatchewan's Victims of Domestic Violence Act on reserves. The Commission recommended that all levels of government immediately resolve the jurisdictional dispute around the Victims of Domestic Violence Act on reserve lands<sup>2</sup>.

In June 2005 the House of Commons Standing Committee on Aboriginal Affairs and Northern Development recommended:

- that the federal government consult with the Native Women's Association of Canada and the Assembly of First Nations regarding matrimonial real property issues
- that the government immediately draft interim legislation to make provincial/territorial matrimonial property laws apply to real property on reserve lands
- that this new legislation should recognize First Nation's inherent jurisdiction with respect to matrimonial real property and provide that First Nations have the authority to enact their own matrimonial property regimes
- in broad consultation and collaboration with First Nations organizations and communities, the federal government should enact legislation on matrimonial real property to apply to First Nations not enacting their own matrimonial property laws within a time frame set out in the interim legislation.<sup>3</sup>

## International Studies & Reports

Several human rights bodies within the United Nations system have expressed concerns about the current state of the law respecting matrimonial property on reserves in Canada; and view the matter as a serious human rights issue.

In 1998, the United Nations Committee on Economic, Social and Cultural Rights, concluded that Aboriginal women living on reserves did not enjoy the same rights as women living off reserves, to an equal share of matrimonial property at the time of marriage breakdown. The Committee called upon Canada to address matrimonial property issues in consultation with the communities affected.<sup>4</sup>

In 2003, the United Nations Committee on the Elimination of Discrimination Against Women expressed serious concerns about the persistent systematic discrimination faced by Aboriginal women in all aspects of their lives.<sup>5</sup> In response, Canada has reaffirmed its commitment to finding a solution to this issue and has said that efforts to find policy and legislative options are underway.

The December 2004 report of the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people recommended that "the Government address with high priority the lack of legislative protection regarding on-reserve Matrimonial Real Property which places First Nation women on reserves at a disadvantage".<sup>6</sup>

In 2005, the United Nations Human Settlement Programme in a report entitled "Indigenous Peoples' Right to Adequate Housing: A Global Overview" examined Canada as one of its case studies and looked in some detail at the situation of matrimonial property law on reserves. This report concluded that "*indigenous men and women must participate freely and equally in the development of any legislation, policies, or programmes that may have an impact on their housing conditions*". (p.184) This report also recommended that "*Governments and indigenous community leaders must enact and implement laws and policies that legally protect the housing rights of all women, including indigenous women, upon marriage breakdown or death of a husband/spouse. This should include, laws ensuring that women, including indigenous women, can remain in their homes upon marriage dissolution or the death of a husband/spouse.*" (p.191)

In November 2005, the United Nations Human Rights Committee expressed concern that "the discriminatory effects of the Indian Act against Aboriginal women and their children in matters of reserve membership has still not been remedied, and that the issue of matrimonial real property on reserve lands has still not been properly addressed." This United Nations human rights body recommended that Canada "should, in consultation with Aboriginal peoples, adopt measures ending discrimination actually suffered by Aboriginal women in matters of reserve membership and matrimonial property, and consider this issue as a high priority."<sup>7</sup>

## Considerations in Addressing Matrimonial Property Issues Under the Indian Act

First Nation men, women and children can all be affected by whether or not the law treats each spouse fairly when a marriage or common law relationship breaks down. Having laws that fully and fairly address matrimonial property rights can be important for spouses and their children.

Much research and study has been done on this issue. In general, the research suggests laws are needed to help resolve disputes between spouses over property rights on reserves.

There are some important principles to think about when considering what kind of matrimonial property laws are needed:

- the equal value of men and women
- the equal contribution of men and women to family life
- the interests of children
- the need to protect First Nations' collective property interest in their reserve lands
- the distinctive ways First Nation people hold land on reserve
- the different ways that First Nations make land allotments to individual members of the First Nation
- First Nation cultural values relating to family and land.

In developing any new matrimonial property law, there will be many important issues to consider, such as:

- should people in common-law relationships be treated the same as married couples?
- what protections respecting matrimonial property are needed on reserve?
- which government or governments have the responsibility to make matrimonial property laws - First Nation governments? the federal government?
- what institutions (for example, family courts or tribunals, mediation, etc.) are needed? (to ensure that First Nation people have access to a justice system where matrimonial property rights on reserve can be dealt with)
- how should the interests of non-member spouses be taken into account?

## Endnotes:

1. Report of the Aboriginal Justice Inquiry of Manitoba, Vol. I, Chapter 13.
2. Final Report from the Commission on First Nations and Métis Peoples and Justice Reform, Saskatchewan, Chapter Recommendation 3.8.
3. Walking Arm-In-Arm to Resolve the Issue of On Reserve Matrimonial Real Property
4. Paragraph 47 of the Concluding Observations of the United Nations Committee on Economic, Social and Cultural Rights on Canada's Third Report, December 1998.
5. Paragraph 361 of the Concluding Observations by the Committee on the Elimination of Discrimination against Women, January 2003, Consideration of Reports submitted by States Parties under Article 18 of the Convention: Canada.
6. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Advance Edited Version, E/CN.4/2005/88/Add.3, 2 December 2004 at para 112.
7. Paragraph 22 of Concluding Observations of the Human Rights Committee: Canada 02/11/2005 CCPR/C/CAN/CO/5.



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# MRP SCENARIOS



## Fact Scenarios

“Matrimonial property” is a very complex issue with many legal ramifications. An easier way to understand is by looking at scenarios and likely outcomes in a legal perspective. The following scenarios are only a glimpse of many that exist.

- What happens when one person is a band member and the other is not?
- What happens when the children are band members and the mother is registered at a different band?
- What happens when one person is a band member, their children from a previous relationship are band members but their children from the current relationship are not and neither is the partner?

The issues get more complex with each new situation. NWAC wants to hear as many scenarios as possible to correct current inequalities in women’s rights to MRP on-reserve. The following scenarios are provided for consultation participants to gain a better understanding of the issues surrounding MRP so the best solutions can be identified.

## Basis Facts for Scenarios

After 10 years of marriage, Linda and Bill have separated and are living apart. They have four elementary school age children. During the marriage, both spouses contributed financially to pay for a land allotment on reserve and to build a family home on that land. Since the separation, Linda has remained in the family home and is the primary care-giver to the children. Both Bill and Linda want to stay in the home to the exclusion of the other. Both spouses feel they have a financial interest in the home that should be recognized.

### Additional Facts - Scenario 1

- Bill and Linda are both members of the First Nation of the reserve on which they reside.
- The land allotment on which the house was built, is held by a Certificate of Possession issued under the Indian Act.
- Only Bill's name is listed on the Certificate of Possession.

#### Likely Outcome for Matrimonial Property Rights

- Linda cannot get an interim order of exclusive possession of the family home.
- Bill may, without Linda's consent, transfer his interest in the family home at anytime by transferring or selling the Certificate of Possession to another band member or to the band.
- Linda may apply to court using provincial law to request a compensation order that takes into account the value of the family home and other matrimonial property.
- Linda cannot get an order of partition and sale to enforce the compensation order by forcing sale of the family home to get her share of the couple's matrimonial property.
- As an "Indian" within the meaning of the Indian Act, Linda can enforce any compensation order she may acquire for her share of the matrimonial property against any assets of Bill (like money) located on reserve.

### Additional Facts - Scenario 2

- Bill and Linda are both members of the First Nation of the reserve on which they reside.
- The land allotment on which the house was built, is held by a Certificate of Possession issued under the Indian Act.
- Both Linda and Bill are listed on the Certificate of Possession as "joint tenants".

#### Likely Outcome for Matrimonial Property Rights

- Both spouses have a right to stay in the family home and neither can get a court order excluding the other, even on a temporary basis.
- Either Bill or Linda can sell their individual interest in the home to another band member without the consent of the other.
- Either spouse may apply under provincial law for a compensation order to divide their matrimonial property in a way that takes into account the value of the family home.
- Neither spouse can get an order of partition and sale to enforce a compensation order (by forcing sale of the family home to get their share of the couple's matrimonial property).
- As an "Indian" within the meaning of the Indian Act, either spouse may try to enforce any compensation order against any assets of the other (like money) located on reserve.

### Additional Facts - Scenario 3

- Bill is a member of the First Nation of the reserve on which the couple resides but Linda is not.
- Linda is member of another first Nation and is an "Indian" within the meaning of the Indian Act.

#### Likely Outcome for Matrimonial Property Rights

- Linda cannot get a court order excluding Bill from the family home even on a temporary basis.

- Linda has no right to remain in the family home.
- Linda may be able to live elsewhere on the reserve if the children are also band members or if rules adopted by council respecting reserve residency of non-members under s. 81(1)(p.1) of the Indian Act allow this.
- Linda may be able to apply under provincial law for a compensation order to divide all of the matrimonial property in a way that takes into account the value of the family home but this is not clear because as a non-member she cannot hold any legal interest in the reserve land.
- Linda may enforce any compensation order she may get against personal property of Bill located on reserve (because they are both "Indians").
- Linda cannot use provincial law to get an order of partition and sale of the home in order to enforce any compensation order she may get under provincial law.

### Additional Facts - Scenario 4

- Bill is a member of the First Nation of the reserve on which the couple resides but Linda is not.
- Linda is neither an "Indian" within the meaning of the Indian Act nor a band member.

#### Likely Outcome for Matrimonial Property Rights

- Linda cannot acquire a temporary possession order nor can she prevent Bill from selling or transferring the home to another band member.
- Linda has no right to remain in the family home.
- Linda may be able to live elsewhere on the reserve if the children are also band members or if rules adopted by council respecting reserve residency of non-members under s. 81(1)(p.1) of the Indian Act allow this.
- Linda may be able to apply under provincial law for a compensation order to divide all of the matrimonial property in a way that takes into account the value of the family home but this is not clear because as a non-member she cannot hold any legal interest in the reserve land.
- Linda cannot enforce any compensation order she may get against personal property of Bill located on reserve (because she is not an "Indian" and Bill as an Indian enjoys an exemption from seizure of property located on reserve under s.89 of the Indian Act).
- Linda cannot use provincial law to get an order of partition and sale of the home in order to enforce any compensation order she may get under provincial law.

### Additional Facts - Scenario 5

- The First Nation does not use the Indian Act Certificate of Possession system. Allotments of land are made by "custom" and recorded by a resolution of Chief and Council.
- The family home is located on a custom allotment and the band council resolution names Bill only as the recipient and a loan to build the home on the allotment has been secured by a loan guarantee approved by the Dept. Of Indian Affairs.
- Both Linda and Bill are band members and status Indians.

#### Likely Outcome for Matrimonial Property Rights

- Provincial law may be used by Linda to ask for a compensation order to divide their matrimonial property in accordance with provincial law.



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