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Wendy Cornet

Allison Lendor

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## Matrimonial Real Property Issues On-Reserve

*Wendy Cornet and Allison Lendor*

### Introduction

For most First Nation reserve communities in Canada, there is currently no applicable law for matrimonial real property disputes from any source—federal, provincial or First Nation governments. The *Indian Act* does not address the issue of matrimonial property rights on-reserve, during marriage or upon marriage or relationship breakdown, or recognize a First Nation law-making authority in the area. In fact, the Act only recognizes a narrow field of First Nation authority over land rights and land management on-reserve, and even less authority over matters relating to family law. The *Indian Act*<sup>1</sup> applies to most First Nation reserve land in Canada. The exceptions are First Nations who have negotiated new legal arrangements replacing the *Indian Act* land management regime through self-government agreements, or through the *First Nations Land Management Act*.<sup>2</sup> These arrangements have provided opportunities for First Nation laws to be adopted addressing matrimonial real property, or for provincial law to be applied.

As a result of the 1986 decisions of the Supreme Court of Canada in the *Derrickson* and *Paul* cases,<sup>3</sup> we know that, while provincial laws relating to matrimonial property apply to *personal* property of “Indians” on-reserve, these laws cannot be applied to modify individual interests on reserve land—such as a family home—under the *Indian Act*. The result is that spouses experiencing a marital breakdown (or breakdown of a common-law or same-sex relationship) are left to resolve property issues affecting the family home largely on their own. There is no applicable body of federal, provincial or First Nation law to guide spouses trying to reach out-of-court settlements, or for courts in dealing with proprietary rights to matrimonial real property issues on-reserve. There is no statement of law recognizing the equal right of spouses on-reserve to the family home, and basic remedies available off-reserve under provincial laws, such as interim exclusive possession of a family home, are not available to spouses on-reserve.

For a number of years, organizations representing First Nation women have urged the Government of Canada to take action to address matrimonial real property issues on-reserve. Litigation has been launched by the Native Women's Association of Canada, and the British Columbia Native Women's Society, over the lack of legal protections respecting matrimonial real property on-reserve (in separate suits against the Government of Canada). They have characterized the lack of applicable legislation recognizing the equal rights of spouses in relation to matrimonial real property as a denial of equality rights. UN human rights bodies have also expressed concerns about equality rights respecting matrimonial real property on-reserve in Canada.<sup>4</sup>

This chapter will provide some general background on the law as it currently stands and identify key policy questions for First Nation women, First Nation<sup>5</sup> governments and the federal government to consider in identifying options for action in this area.

## Framing the Issues

Law often reflects specific cultural values. Canadian family law regarding matrimonial real property (statute law and case law) predominately reflects the cultural values of non-Aboriginal people and European-sourced legal traditions.

Use of the term “matrimonial real property” necessarily presumes the application of several European-sourced legal concepts and assumptions, such as

- division of property into “real” (land and things attached to the land, such as houses) and “personal” (cash, vehicles, pension funds, household goods and so on);
- “ownership” of portions of land by individuals providing exclusive rights as against the rest of the world;
- the capacity to place a monetary value on land and things;
- narrow legal definitions of “spouses” (which often exclude couples in Aboriginal customary marriages, common-law relationships and same-sex relationships); and
- an assumption that matrimonial real property issues do not extend to other family members who are not “spouses” or “common-law partners” (however these terms are variously defined in federal and provincial statutes).

In an *Indian Act* reserve context, these concepts and values respecting property and family matters conflict, in many cases, with First Nation laws and values. This presents a challenge for policy-makers wishing to fill the legislative gap respecting matrimonial real property rights on-reserve.

In addition to differences in underlying values and assumptions, there are a number of legal and factual elements that distinguish matrimonial real property issues on-reserve, under the *Indian Act*, from situations off-reserve:

- absence of fee simple ownership, and restrictions on alienation of interests in reserve land to non-band members;
- the decision-making authority of band councils in determining allotments to individual members, and in determining residency rights of non-member spouses;
- conjugal relationships (whether married under provincial law, married under Aboriginal customary law, common-law relationships or same-sex relationships) often consist of persons with different legal, band membership, or land claim beneficiary status under the *Indian Act*, and, accordingly, different residency rights;
- often limited land or housing to accommodate needs of entire membership and their families;
- band-owned housing on common reserve lands, or band-owned housing on land held by allotment to an individual band member; and
- distinctions in the scope of provincial law applicable to real property interests in designated lands relative to real property interests in unsurrendered reserve lands.

For the Government of Canada, gender equality is a key policy value expected to guide the development of all federal policy and legislation.<sup>6</sup> Some First Nation women question whether mainstream equality analysis and gender equality analysis can assist First Nation women striving to reassert their traditional roles and place in First Nation communities, such as the strong and central role of women in matriarchal societies. A different view, held by other First Nations women, is that only when Charter equality values are applied to all legislation, whether federal or First Nation in source, can women be assured of reasserting their rightful place in First Nation communities.

It is clear from judicial decisions and federal policy statements that Charter equality analysis and gender equality analysis are supposed to take into account relevant contextual factors, such as the existence of multiple or compounded forms of discrimination and social inequality. How such analyses of compound discrimination are to be conducted is less clear. It is a relatively untouched area of judicial decision and federal policy analysis in a First Nation context.<sup>7</sup>

In the context of matrimonial real property issues on-reserve, such an analysis would recognize how First Nation women have, historically, experienced racism and sexism—as well as other forms of discrimination—as a result of the *Indian Act*. For example, the imposition of non-Aboriginal concepts of private or individual property rights, combined with numerous

forms of patriarchal biases, have led to First Nation men being the primary holders of Certificates of Possession on-reserve. This, in turn, contributed to the displacement of many First Nation women from their traditional roles, and negatively affected their gender relations with men and their relationship to First Nation land. With respect to matrimonial real property, the collective impacts of colonialism (e.g., the displacement or suppression of First Nation cultural values combined with gender bias) have resulted in many women finding themselves in a disadvantageous legal position when their marriage or common-law relationship breaks down. A comprehensive gender equality analysis must also recognize that First Nation women can be negatively affected, in regard to matrimonial real property issues, by the net effect of the *Indian Act* and decision making by Band Councils at the First Nation community level.

## Individual Rights to Occupation and Use of Reserve Land

Under the Canadian legal system, legal title to Indian reserve land is held by the federal Crown for the use and benefit of specific First Nations through the “Bands” recognized under the *Indian Act*.<sup>8</sup> Under the *Indian Act*, there is no individual fee simple ownership of reserve land, but a system of allotment of individual rights of possession of specific sections of reserve land.<sup>9</sup> “Allotment” is the term used to refer to the granting of the right to use and occupy reserve land to a member of a First Nation by the council of the First Nation.<sup>10</sup> The *Indian Act* requires that allotments of reserve land to band members be authorized by the Band Council and approved by the Minister of Indian Affairs (or by the Band Council on the Minister’s behalf when this authority has been delegated, as mentioned above.) Under the *Indian Act* system of reserve land allotment to individuals, a Certificate of Possession is to be issued following Ministerial approval. Band members may transfer a land allotment to another band member, but the Act requires that the transfer be approved by the Minister. The rights of First Nation individuals holding land allotments by Certificate of Possession have been characterized as unique and not comparable to any legal interest in land off-reserve.<sup>11</sup>

Some First Nations refuse to use Certificates of Possession and instead operate custom systems of allotment. Custom allotment is a right to occupy reserve land granted to an individual by a Band Council or First Nation government outside of the authority of the *Indian Act*, meaning the First Nation does not request approval or registration of the allotment, and a Certificate of Possession is not issued. The Indian Lands Registry, administered by the Department of Indian Affairs, does not accept these transactions—or any subsequent transfers for registration—as they are considered “outside the Indian Act and are not legal interests under the Act.”<sup>12</sup>

The fact that transfers by individual band members of reserve lands are often not registered suggests the Indian Lands Registry may not reflect the social reality of land transfers on-reserve, nor the reality of customary law of First Nations using customary allotment. There are, in effect, competing legal systems on-reserve with respect to land allotments, and as a result, disputes often end up in the courts.<sup>13</sup> The uncertainty affecting land allotments, transfers and proof of legal entitlement to occupy specific portions of reserve land can negatively impact efforts to clarify matrimonial real property issues.

## **Overview of Provincial/Territorial Law on Matrimonial Property**

Matrimonial property can be personal and real property owned by either or both spouses. Provincial and territorial laws in Canada set out legal principles for defining exactly what constitutes matrimonial property, and for placing a value on it in order to determine an equitable division upon dissolution of marriage. Provincial matrimonial property legislation is passed under the broad scope of authority provided by s. 92(13) of the *Constitution Act, 1867*, under the head of power titled “Property and Civil Rights in the Province.”

Provincial and territorial legislation also, typically, provides for interim remedies, such as exclusive possession of the matrimonial home during a period of separation or in situations of family violence. Some provinces and territories have adopted family violence legislation to address the need for protection of abused family members, and for the right of victims to remain in their home.<sup>14</sup> Off-reserve, orders of interim exclusive possession can be issued in respect to a matrimonial home regardless of whether the home is owned or is being leased, and irrespective of which spouse may be listed on the title or lease. Other grounds on which a spouse can seek an interim order for exclusive possession of the matrimonial home include the best interests of children.

The purpose of today’s matrimonial property laws is to recognize the equal position of spouses within marriage, to recognize marriage as a form of partnership and to provide for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the marriage.

In an off-reserve context, each province and territory has passed legislation addressing the division of matrimonial property—both “real property” (land and buildings on the land) and “personal property” (assets other than real property, such as cash, investments and proceeds from sale of matrimonial real property). This provincial/territorial legislation expresses legal principles that can be used to guide married couples in reaching

agreements out of court on the division of their matrimonial property. Where a married couple cannot agree, the courts can apply these principles to grant remedies, and make orders to address the rights of each party.

In several provinces, matrimonial property legislation applies only to married couples and not to common-law relationships. The exclusion of common-law relationships from the definition of “spouse” in a Nova Scotia statute<sup>15</sup> (since changed to include common-law relationships registered as “domestic partnerships”<sup>16</sup>) was unsuccessfully challenged as a violation of Charter equality rights in *Nova Scotia (Attorney-General) v. Walsh*.<sup>17</sup> Nevertheless, some jurisdictions have extended their matrimonial property law to include common-law and same-sex relationships.

While there are differences from jurisdiction to jurisdiction, the following are some common elements typically found in most, if not all, provincial and territorial legislation addressing matrimonial real property:<sup>18</sup>

**Definition of matrimonial property.** All provincial and territorial legislation defines “matrimonial property” (or equivalent term) in terms of personal and real property owned by either or both spouses, and property used for a family purpose. Most legislation includes a specific definition of “matrimonial home” (or equivalent term) (Only British Columbia does not). While the matrimonial home is usually one property (the place where the family ordinarily resides), the definition can encompass other property in some jurisdictions if it is used for a family purpose, such as a summer residence.

**Equal rights of possession to matrimonial home during marriage.** Regardless of actual ownership (whether one or both spouses’ names are on the title to the matrimonial home), provincial/territorial legislation recognizes the right of possession of both spouses to the matrimonial home. This usually means that neither spouse can sell the house or have an encumbrance placed on the title without the other’s agreement or a court order to that effect. (However, this does not affect the rights and powers of each spouse to freely dispose of other assets to which he or she has title during the marriage.) The equal right to possession of the matrimonial home is subject to court orders otherwise applicable (e.g., in situations of domestic violence). The value of the matrimonial home is included in the calculation of the overall division of matrimonial property.

**Provision for equalization payments based on the value of matrimonial property.** Provincial law establishes a formula for dividing the monetary value of matrimonial property, typically based on a presumption of an equal division of the value of the net family property (including real and personal property). In Ontario, for example, the total value of all real and personal property held by each spouse is added up, and an equalization payment of half the difference of the two amounts is made to the spouse with

the lesser total. This calculation can be varied by the court if it would cause undue hardship, or if variation would otherwise be just in the circumstances.

**Remedies.** Provincial law typically provides a range of remedies to spouses in conflict over the matrimonial home, such as

- interim orders of exclusive possession to one spouse upon separation (and pending final resolution), or in cases of domestic violence;
- orders of partition and sale (e.g., as part of a final resolution where parties cannot agree on who should get the matrimonial home if both want it); and
- orders to set aside a transaction where the matrimonial home has been sold or otherwise transferred by one spouse without the other spouse's consent.

**Rules respecting agreements.** In addition to statutory rules for the division of matrimonial real property, provincial and territorial law contemplates the use of various kinds of agreements between married couples and common-law partners, such as marriage contracts, separation agreements, or cohabitation agreements. Provincial and territorial statute law often prescribes rules respecting the interpretation and effect of such agreements. Most provinces and all territories include provisions governing agreements on property between common-law partners, and a smaller number include same-sex partners in these rules.

Provincial/territorial law respecting the division of matrimonial property *other than land* (personal property) does apply to First Nation people on-reserve as law of general application (subject to the terms of any land claim or self-government agreement). This means courts can use provincial laws to determine how to divide the monetary *value* of matrimonial property on-reserve. All provincial laws of general application respecting real property off-reserve apply to First Nation people.

However, the legal principles, rights and remedies under provincial law applying to matrimonial real property located *off-reserve* are generally not available to married spouses respecting their *on-reserve* real property (nor to common-law partners, couples married by custom, or same-sex partners). The only exception in the case of a married couple is the power of the court to include a valuation of an interest in a reserve land allotment in calculating a compensation order.



## Provincial/Territorial Family Violence Legislation

In addition to division of matrimonial property legislation, some provinces and territories have adopted domestic violence legislation to provide civil law remedies in addition to criminal law protections. Family violence legislation has been adopted in Yukon, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia and PEI. These laws typically allow people to apply to court for restraining orders against violent spouses or other family members, and for orders of temporary exclusive possession of the matrimonial home and its contents. The intent is to provide some basic protection for victims of violence in terms of personal security while also addressing the need of victims of family violence to stay in their own homes.

## Matrimonial Real Property On-Reserve

First Nation reserve communities who have opted to come under the land management provisions of the *First Nations Land Management Act* are required to adopt a code addressing the division of matrimonial real property following adoption of a comprehensive land code. Some First Nations who have negotiated self-government and comprehensive claims agreements also have law-making powers in respect to matrimonial property and related issues.

The vast majority of First Nation reserve communities, however, remain subject to the *Indian Act*. The *Indian Act* does not address the issue of division of matrimonial real property (individual interests in reserve land). Provincial and territorial family law (whether aimed at division of matrimonial property or family violence), which otherwise provides courts certain powers to declare or change rights of possession to matrimonial property, cannot override individual rights of allotment made under the federal *Indian Act*. This has been made clear by two key decisions of the Supreme Court of Canada in 1986.

In *Derrickson v. Derrickson*, both husband and wife were members of the Westbank Indian Band. Mrs. Derrickson brought a petition for divorce and applied for one-half interest in the properties for which her husband held Certificates of Possession. She relied on the application of provincial family law legislation in requesting this order. The Supreme Court of Canada held that provincial family law could not apply to individual rights of occupation in Indian reserve lands. More specifically, the court determined that provincial laws entitling each spouse to an undivided half-interest in all family assets could not be applied to land allotments on-reserve. The court stated: “The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24)

of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.” The court was able to make an order for compensation (taking into account the value of the land allotment) for the purpose of adjusting the division of family assets between the spouses under the relevant provincial family law.<sup>19</sup>

In *Paul v. Paul*, the husband and wife—both members of the Tsartlip Indian Band—had been married for nineteen years, and had built a home on land held by the husband by way of a Certificate of Possession issued under the *Indian Act*. The couple had been living in the home for sixteen years. Mrs. Paul applied for an order of interim possession of the matrimonial home. The Supreme Court of Canada ruled that provincial family law could not be used to grant an order of interim occupation of a family residence on-reserve.<sup>20</sup> As in *Derrickson*, the court found that the provincial legislation being relied on to make the requested order was in actual conflict with the provisions of the *Indian Act* (s. 20). In a B.C. case, the court applied *Derrickson* and *Paul* and held that it could not order partition and sale under a provincial statute where a couple jointly held a Certificate of Possession.<sup>21</sup> These are just a few of the cases where courts have struggled to assist the parties, but have had very limited, and, at times, no remedies at their disposal due to the lack of federal legislation in the field.

The result is that provincial family law legislation does not apply to reserve land in any way that can affect individual interests in reserve land. Gaps in applicable law mean very limited remedies are available to married couples on-reserve (and even fewer to common-law and same-sex couples) during marriage or upon marriage breakdown.

First Nation women’s organizations have identified the need for action in this area as a priority issue.<sup>22</sup> First Nation women, through their representative organizations, have pointed out that, while First Nation women are not barred by any direct legislative provision from possessing Indian reserve lands, there is a long history of various forms of discrimination aimed at First Nation women through the *Indian Act* (particularly provisions relating to Indian status, band membership and enfranchisement). These often have had the effect of excluding Indian women from reserves or from possessing individual interests in reserve lands.<sup>23</sup>

The consequences of the absence of federal law on matrimonial real property on-reserve are often very negative (as the Special Representative on the Protection of First Nations Women’s Rights explains in detail in her report).<sup>24</sup> If a woman’s spouse holds the Certificate of Possession for the land on which the matrimonial home is located, her situation can quickly become very vulnerable. If she does not have membership in her husband’s band, her right to remain on the reserve may vanish with the breakdown of her marriage. Even if she has membership, should the husband decide to transfer his interest to the band or to another member of the band, or if she is told to

leave or has to leave, there is no legal remedy for her to gain possession of the house—not even on an interim basis where she is the primary caregiver to children of the marriage.

The only remedy generally available to a spouse without the Certificate of Possession is an order of compensation based on the applicable provincial formula for division of marital assets (personal and real property). This remedy does not address her immediate need for housing for herself and her children, nor is it very useful unless the spouse has money sufficient to pay out the order.

When women do hold a Certificate of Possession jointly with their partner, but leave the matrimonial home upon separation or due to domestic violence, they can experience difficulty in getting another allotment from Band Councils. This can happen where there is a perception that the family entitlement to land has been filled by the allotment of the matrimonial home, or where there is a shortage of land.

Possession of on-reserve property can often determine the ability to live on-reserve at all. Severe lack of housing on-reserve combined with marital breakdown may lead to a woman having to leave the matrimonial home to live in overcrowded conditions with friends or relatives, or to leave the reserve altogether. The generally low income levels of First Nation women brings a higher risk of becoming homeless, and having their children taken into care if forced to move off-reserve. In other words, dissolution of marriage on-reserve can generate a succession of negative events that can quickly spiral into homelessness for some First Nation women where they are not the sole holder of a Certificate of Possession to the matrimonial home.

## ***First Nations Land Management Act***

The *First Nations Land Management Act* (FNLMA) was passed by the federal Parliament in 1999 on the initiative of fourteen First Nations. These First Nations wished to escape the land management provisions of the *Indian Act* in order to improve their opportunities for economic development.

The FNLMA requires each community to establish a community consultation process for “the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests in first nation land” among other required elements of the land code.<sup>25</sup> Subsection 17(1) provides that a First Nation shall, following community consultations, “establish general 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.” Subsection 17(2) requires each First Nation within twelve months after its land code comes into force to

incorporate the general rules and procedures into its land code, or enact a First Nation law containing the general rules and procedures. Under subsection 17(3) the First Nation, or Minister of Indian Affairs, may refer any dispute relating to the establishment of the general rules and procedures to an arbitrator in accordance with the Framework Agreement.

So far, four of the fourteen First Nations to which the *First Nations Land Management Act* applies have adopted a matrimonial property law. These four laws are quite similar to one another. The laws adopted by the Mississaugas of Scugog Island First Nation, Muskoday First Nation, Georgina Island First Nation and Lheidi T'Enneh First Nation under the FNLMA represent a huge step forward compared to the situation under the *Indian Act*. The First Nations under the FNLMA can also call on the assistance and resources of the Lands Advisory Board to further develop and refine laws in this area, as required. However, the lack of an interim regime pending the adoption of specific First Nation matrimonial property laws has been a key point of criticism from First Nations women's organizations.

## **Matrimonial Real Property under Self-Government Agreements**

Under the federal self-government and comprehensive claims policies, several agreements have been reached with various First Nations. These agreements demonstrate a range of different approaches to the question of matrimonial property—from not specifically addressing it, to choosing to have provincial laws of general application apply to the expression of a clear and detailed description of First Nation authority over the matter.

Most self-government agreements do not specifically mention jurisdiction over matrimonial property in provisions listing the law-making authority of First Nations. Where self-government agreements recognize First Nation jurisdiction over reserve land or settlement land, the ability to make laws with respect to matrimonial real property may be included.

Some self-government and comprehensive agreements provide for the application of provincial laws respecting matrimonial real property through general provisions respecting the application of provincial laws of general application to the settlement lands of the First Nation. The Nisga'a Final Agreement deems Nisga'a settlement lands not to be s. 91(24) lands (lands reserved for the Indians). This means that in the absence of a Nisga'a law on the subject of matrimonial real property respecting Nisga'a lands, provincial laws of general application would apply.

Another approach is for the self-government agreement to recognize the power of a First Nation to adopt a provincial or territorial law of general application as its own (see Article 20.1 of the Champagne and Aishihik First

Nation Self-Government Agreement). Still another approach is to address matrimonial real property expressly. In the 2001 Meadowlake First Nation Comprehensive Agreement-in-Principle, the subject of family property is dealt with in considerable detail in Chapter 26, and covers all the basic issues at stake with respect to matrimonial real property. Most self-government agreements recognize First Nations law-making authority with respect to marriage, but do not address, or specifically exclude, jurisdiction over annulment or divorce.

The Aboriginal Self-Government policy adopted by the federal government in 1995 recognizes law-making authority over “marriage”—and over property rights on-reserve—as part of the inherent law-making authority of First Nations that it is willing to discuss through the self-government negotiation process mandated by the policy.<sup>26</sup>

## Customary Marriages

The issue of whether and how Canadian law recognizes Aboriginal customary law relating to marriage is an important aspect of considering matrimonial real property law in a First Nation context. First Nation people and courts must be able to accurately identify the relationships to which any division of matrimonial property rules under federal, provincial/territorial, or First Nation law would apply whether on- or off-reserve. It is also important to determine what governmental authorities may determine when, and how, a marriage has been, or can be, terminated.

On the whole, Canadian law has accepted the validity of Aboriginal marriage by custom where the necessary elements identified in the *Connolly v. Woolrich and Johnson* case exist.<sup>27</sup> These elements are: validity in the community, voluntariness, exclusivity and permanence. It is arguable that marriage by Aboriginal custom is an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, and that a claim based on the resulting marital status is an exercise of that right. However, there is no reported case yet recognizing an Aboriginal customary marriage in the context of matrimonial property issues.

## Issues Relating to Aboriginal Customary Law

First Nations scholars have emphasized how difficult it is to explain and relate First Nation notions of law and collectively held values in a way that can be properly understood by Western legal thinkers.<sup>28</sup> Many aspects of First Nation law, values and worldview are radically different from their European-based counterparts.

A challenge for any effort to genuinely respect and recognize Aboriginal customary law is that it is not a system of law based on lists of jurisdictional powers, but rather is a flexible, dynamic and holistic knowledge system. In addition, a discussion of law-making authority over “division of matrimonial property” presumes a certain conception of property and notions of private individual ownership that are often not consistent with the customary law and values of most First Nations.

## Conclusion

The need for applicable laws addressing matrimonial property issues on-reserve is especially acute. Many First Nation communities suffer from housing and land shortages. In addition, the upheaval from marriage breakdown and family violence occurs in a larger context of the ongoing legal and cultural impacts of colonialism.

Another important consideration is that women living on-reserve are more often the primary caregivers of young children—and the victims of family violence—than men. The need to ensure shelter for women and children on-reserve, and some degree of stability and continuity in living conditions for children experiencing family upheaval from marriage breakdown or family violence, is especially important. Yet, not a court in the land can offer a resolution of spousal conflict regarding possession of the matrimonial home for most reserves beyond enforcing the rights of a spouse with a Certificate of Possession (where these are used).

There are several factors contributing to this state of the law:

- colonial interference with First Nation values and laws in relation to land, family and conflict resolution (through the imposition of the federal *Indian Act* and a foreign, i.e. non-Aboriginal, system of justice);
- the silence of the antiquated *Indian Act* on matrimonial real property;
- the non-applicability of provincial matrimonial real property law (*Derrickson* and *Paul*); and
- limited access to, or in some cases, interest in, the alternatives within existing federal policy to the *Indian Act* regime—e.g., FNLMA or self-government agreements negotiated within the parameters set by federal policy.

The *Indian Act* has had many negative cultural impacts on First Nation communities, and on the position of women in their communities and their relationship to the land. The introduction and imposition of individual land interests, combined with patriarchal biases in areas such as Indian status, band membership and the granting of individual allotments of reserve land,

have created numerous cultural tensions and complex policy issues that affect matrimonial real property issues on-reserve in almost every aspect.

For most First Nations women on-reserve, the collective effect of the Canadian legal system as it currently stands—the colonial and patriarchal biases of the federal *Indian Act* over a long period, the lack of applicable federal, provincial, or First Nations laws on matrimonial real property matters, decisions by Band Councils regarding band membership, housing and land allotments, the lack of housing and land in many reserve communities, and problems related to enforcement of applicable federal, provincial and First Nation laws—results too often in a lack of protection and a lack of very basic legal remedies, relative to the situation of Aboriginal and non-Aboriginal people off-reserve.

There are several distinct legal regimes governing land issues on-reserve—the *Indian Act*, the *First Nations Land Management Act*, and a range of self-government and land claims agreements. There is also an array of legal opinion on the extent to which the Constitution of Canada contemplates the exercise of inherent First Nation jurisdiction over family law matters independent of a self-government agreement between a given First Nation and the federal Crown.

The legal situation of First Nation people across the country, with respect to matrimonial real property, varies according to the specific legal regime governing land issues in their communities, and the extent to which it affords room for the exercise of First Nation jurisdiction (inherent or delegated)—or the adoption or incorporation of provincial family law.

Apart from the question of inherent First Nation jurisdiction, the current state of the law, and of federal policy in respect to matrimonial real property, can be summarized as follows:

- no *Indian Act* provisions specifically address the issue of matrimonial real property rights on-reserve during marriage or upon marriage breakdown;
- provincial/territorial matrimonial property legislation cannot apply to alter any interests granted to individuals under the *Indian Act* in unsurrendered reserve lands, including interests in such lands that fall within the meaning of matrimonial property of the jurisdiction concerned (unless the application of such provincial laws to a given reserve is negotiated through a self-government or land claims agreement);
- provincial/territorial matrimonial property legislation may apply to leasehold interests in designated reserve lands; and
- within the framework of federal policy as it currently stands, the only existing options for First Nations to escape the *Indian Act* status quo and its silence on matrimonial real property is through



negotiation of an agreement to come under the FNLMA, or negotiation of a self-government or claims agreement (where such negotiation processes are available to the First Nation in question).

In considering new policies, programs, or legislative initiatives (whether federal or First Nation) in relation to matrimonial real property issues on-reserve, there are several important policy considerations that flow from the review of legal and policy issues in this chapter. The list below is not intended to be exhaustive.

## **1. Different Reserve Land Management Regimes**

From a national perspective, there are, generally speaking, three different categories of reserve land management situations: (1) reserves that are subject to the *Indian Act* land management regime; (2) reserves that have opted into the First Nations Land Management Act (FNLMA), and operate under First Nation designed land management codes; and (3) reserves belonging to First Nations who have negotiated self-government or land rights agreements with new land management regimes (and other aspects of self-government).

Any initiative to address matrimonial real property rights on-reserve must take into account these different legal regimes, and the different situation and needs of First Nation women in each of them. Another important consideration is that the differences between these different legal regimes means that matrimonial real property issues on-reserve are being addressed more comprehensively in some reserve communities than others.

## **2. Source and Scope of Law Making**

A key question to answer is whether legislative action should be left entirely to First Nations (continuing and extending the approach taken under the FNLMA), or whether any form of national legislation is needed or desirable to meet the policy principles and considerations set out in this paper.

The answer to this question may turn on one's perspective of what constitutes an appropriate use of federal legislative power pursuant to s. 91(24), or any other federal head of power. The Assembly of First Nations, and many other First Nation organizations and First Nation governments, have taken policy positions in the past that the federal government cannot (consistent with its stated commitment to self-government or its constitutional obligations to Aboriginal peoples) enact legislation affecting the rights and interests of First Nations without First Nation consent. On the other hand, some First Nation women's advocates have said the federal



government has a duty to ensure that First Nation women have access to the same level and scope of protection and remedies as women off-reserve with respect to matrimonial real property, which includes enacting appropriate federal legislation for this purpose. If First Nations are to be recognized as having law-making powers in this area, the question of the scope of such a power is an important one. If one compares the tiny area of law-making authority recognized under the *Indian Act* in relation to land and family law—to the authority provincial governments enjoy—it is not fair to expect that First Nations will be able to address matrimonial real property issues as effectively as provincial/territorial governments without recognition of a similar scope of authority. Properly addressing matrimonial real property issues on-reserve will involve more than merely adding a line to the by-law powers under the *Indian Act*. Careful thought must be given to the description of the law-making power required, and the implications for First Nation authority over land and family law in general.

### **3. Impact on Other Areas of Law**

Legislative initiatives in regard to matrimonial real property issues must consider related areas of law, and how these may or should be affected, for example, wills and estates, marriage and divorce.

Any proposed federal reforms would need to contemplate possible legal and policy implications for communities under the *First Nations Land Management Act*, and other communities in the process of negotiating self-government agreements or agreements relating to the *First Nations Land Management Act*.

### **4. Gender Equality Concerns**

The concept of gender equality raises a number of policy issues, given the diverse views on what it means and its implications for First Nation communities. Gender equality in a First Nation context is especially challenging to “contextualize” in a situation where First Nations are dealing with many other outside legal concepts and policy objectives of other levels of government. Conducting gender equality analysis in a First Nation context will require incorporating the spectrum of equality issues facing First Nation women, and identifying means of empowering women and their communities. For example, it must be recognized that the vulnerability of First Nation women and their children, dealing with the trauma of marriage or relationship breakdown, is made more acute by cultural upheaval, and, in some cases, family violence.

There are also unique issues affecting non-member Aboriginal spouses and non-Aboriginal spouses on-reserve as a result of their different legal rights in relation to residency, land allotments and other matters.

## **5. The Interests of Children**

The interests of children upon breakdown of a marriage, common-law, or same-sex relationship should be paramount. In this regard, the need for shelter, a stable home environment and parental support are important considerations, as well as the right to stay within the community and have access to the child's culture and community. These goals can be challenging to meet where a custodial parent or guardian does not share the same legal status as the child with respect to band membership. The manner in which the legal principle of the "best interests of the child" is applied in a First Nation context is a key policy concern of First Nation women.

## **6. Resource and Capacity Needs of Women at the Community Level**

Even where First Nations leadership have specific legal obligations to address the issue of matrimonial property rights on-reserve, the conditions are often lacking to enable women to participate meaningfully in community discussions. Women often do not have the information they need to influence the content of First Nations laws.

First Nations women at the community level require information on the current status of the law in this area, and assistance and support to have input into any process of reform at any level of government. The role of the federal government in funding First Nation women's organizations, or community legal services organizations to carry out such work, needs to be considered.

## **7. Scope of Relationships**

There is a need to determine the scope of any proposed initiatives affecting the rights of opposite-sex couples on-reserve—whether married under provincial law, married under traditional/Aboriginal law, or living common-law. At the same time, notions of family and the rights of common-law and same-sex couples continue to evolve under provincial and federal law in many areas, including matters in relation to marriage and matrimonial property. The treatment of common-law couples requires consideration of whether matrimonial property law should be applied in the same manner as married couples, and whether common-law couples should be included in matrimonial property legislation on a mandatory or opt-in basis.

The different situation of people on-reserve with respect to Indian status, band membership, or First Nation membership must be considered as it can affect access to certain property interests on-reserve, and the capacity to enforce judgements against an "Indian" spouse resident on-reserve.

## **8. Land and Housing Situations**

The severe lack of housing and suitable land for housing is a critical reality for many First Nations. In such situations, the need of couples for assistance and guidance on their legal rights and interests, and the best way to address the rights and interests of both parties fairly, is great. The need for clear legal guidelines, whether federal or First Nations in origin, is underlined in situations where housing is a scarce commodity. The varied use of the *Indian Act* land allotment process and custom allotment systems must be taken into account, as well as the situation of people living on leased lands or band lands.

In addition, the different types of housing situations on-reserve must be taken into account—social housing owned by the band, or privately built houses on land held under Certificate of Possession by either or both partners or on band-held land.

## **9. Legal Remedies and Alternative Dispute Resolution**

The need for speedy access to remedies, such as interim orders for possession of the matrimonial home and issues relating to enforcement, needs to be considered, especially for women in situations of family violence and for women who are the primary caregivers of children. Ultimately, a comprehensive package of remedies and responses (e.g., legal initiatives, programs and housing) should be considered, and not simply one or more legislative options.

The difficulty many First Nation people face in gaining access to the courts is another consideration (e.g., due to distance from home to a major centre with a court, financial limitations, limited access to legal aid resources, lack of knowledge or comfort with European-based legal system, lack of familiarity of Canadian courts with First Nation cultural context). There are a range of views on whether this issue should be addressed by alternative dispute resolution mechanisms established by federal legislation (such as a specialized tribunal that could assist in matrimonial real property issues on-reserve), or in the larger context of First Nations and the administration of justice (such as proposals for a First Nation justice system), or by more limited community initiatives such as elders councils.

## **10. Community Legal Aid and Mediation Services**

The letter of the law is primarily used by those individuals who have the resources to hire legal counsel to advise them on their rights and how to protect their interests. Legislative amendments alone will not address the need to help couples resolve matrimonial real property issues through agreement, as much as possible, without expensive court actions.

The limited access of First Nation women to community legal aid services and to mediation services must also be considered. Cutbacks in such services have occurred in many provinces. Mediation services must take into account the particular cultural context of a given First Nation, and the vulnerability of women in situations of family violence. Where legislation requires mediation, some consideration has to be given to the ability or inability of individuals to pay for such services.

## **11. Information Sharing and Consultation**

The need to raise understanding of matrimonial real property issues at the community level, as well as the timing and manner of consultations in respect to legislative and non-legislative options, are important considerations.

## Endnotes

This article is a shorter and edited version of a discussion paper prepared for the Department of Indian Affairs and Northern Development in November 2002 entitled *Discussion Paper: Matrimonial Real Property On Reserve* by Wendy Cornet and Allison Lendor.

1. *Indian Act*, R.S.C. 1985, c. I-5.
2. *First Nations Land Management Act*, S.C. 1999, c. 24.
3. *Derrickson v. Derrickson* [1986] 2 *Canadian Native Law Reporter* 45 (S.C.C.); *Paul v. Paul* (1986), 26 *Dominion Law Reports* (4th) 175 (S.C.C.).
4. See for example, the 1998 Report of the United Nations Committee on Economic, Social and Cultural Rights reviewing Canada's compliance with the International Covenant on Economic, Social and Cultural Rights (UN. E/C.12/1/Add.31, 4 December 1998, at paragraph 29).
5. This paper uses the term "First Nation" or "First Nations" to refer generically to the peoples subject to the *Indian Act*, except where the context requires use of the Indian Act term "Indian." "Aboriginal" is generally used in reference to constitutional rights or issues in accordance with legal practice in this area.
6. Indian and Northern Affairs Canada, *Gender Equality Analysis Policy* (1999); Justice Canada, *Diversity and Justice: Gender Perspectives* (A Guide to Gender Equality Analysis) (1998); Status of Women Canada, *Federal Plan for Gender Equality* (1995).
7. *Rivers v. Squamish Indian Band* [1994] CHR D No. 3, is an example of a case where the B.C. Human Rights Tribunal recognized a case of compound discrimination in a First Nation community.
8. Section 18 provides that reserves are held by Her Majesty for the use and benefit of the respective bands for which they are set apart. Subject to the Act and the terms of any treaty, the Governor in Council may determine whether any purpose for which any lands in a reserve are used, or are to be used, is for the use and benefit of the Band.
9. Under s. 20 Band Councils have a power of allotment of land in a reserve—subject to Ministerial approval. Subsection 20(1) provides that no Indian is lawfully in possession of land in a reserve, unless possession has been allotted by the Band Council with the approval of the Minister of Indian Affairs.

10. Indian and Northern Affairs Canada, *Understanding the Regulatory Environment for On-reserve Lending* (May 1999), 1.
11. *Pronovost v. Minister of Indian Affairs and Northern Development* [1985] 1 F.C. 517, per Marceau J.
12. Indian and Northern Affairs Canada, *Understanding the Regulatory Environment*, 11.
13. See *Lower Nicola Indian Band v. Trans-Canada Displays Ltd.*, [2000] 4 *Canadian Native Law Reporter* 185, 2000 BCSC 1209 (B.C.S.C.); and D. Sanders, *The Present System of Land Ownership*, paper presented to the First Nations' Land Ownership Conference, 29–30 September 1988 at the Justice Institute of British Columbia. Sanders concludes that "the Indian Act attempt to establish a complete and exclusive system of rights in reserve lands has not succeeded." Sanders estimates that half of all bands in Canada do not use the Indian Act system at all, and notes that some bands combine custom allotment systems with some usage of Certificates of Possession.
14. *Alberta Protection Against Family Violence Act*, R.S.A. 2000, c.P-27; *Manitoba—The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, R.S.M. 1998, D.931; *Nova Scotia—Domestic Violence Intervention Act*, S.N.S. 2001, c.29; *Ontario—The Domestic Violence Protection Act*, 2000, S.O. 2000, c.33. (not yet proclaimed in force); *Prince Edward Island—Victims of Family Violence Act* S.P.E.I. 1996, c.V-3.2; *Saskatchewan—The Victims of Domestic Violence Act*, S.S. 1994, c.V-6.02; *Yukon Territory—Family Violence Protection Act*, S.Y. 1997, c.12.
15. *Matrimonial Property Act*, R.S.N.S. 1989, c. 175, s. 2(g).
16. *Law Reform (2000) Act*, S.N.S. 2000, c.29.
17. *Nova Scotia (Attorney-General) v. Walsh* (2002), 297 N.R. 203 (S.C.C.).
18. *Matrimonial Property Act*, R.S.A. 2000, c. M-8 (Alberta); *Family Relations Act*, R.S.B.C. 1996, c. 128 (British Columbia); *The Marital Property Act*, R.S.M. 1987, c. M45 (Manitoba); *Marital Property Act*, S.N.B. 1980, c. M-1 (New Brunswick); *Family Law Act*, R.S.N. 1990, c. F-2 (Newfoundland); *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (Nova Scotia); *Family Law Act*, R.S.N.W.T. 1997, c. 18 (Nunavut); *Family Law Act*, S.N.W.T. 1997, c. 18 (Northwest Territories); *Family Law Act*, R.S.O. 1990, c. F.3 (Ontario); *Family Law Act*, S.P.E.I. 1995, c. 12 (Prince Edward Island); *C.C.Q.* 1991, c. 64., Division III (Quebec); *Family Property Act*, S.S. 1997, c. F-6.3 as amended by the S.S. 1998, c. 48 and 2001, c. 34 and 51 (Saskatchewan); *Family Property and Support Act*, R.S.Y. 1986, c. 63 (Yukon).
19. *Derrickson v. Derrickson* [1986] 2 *Canadian Native Law Reporter* 45 (S.C.C.).
20. *Paul v. Paul* (1986), 26 D.L.R. (4th) 175 (S.C.C.).
21. *Darbyshire-Joseph v. Darbyshire-Joseph* (November 30, 1998), Doc. Vancouver D106124 (B.C.S.C.).

22. The Native Women's Association of Canada has been very active on this issue for some time. The issue received discussion in debate in the House of Commons and in Committee when the ratifying legislation for the Nisga'a Final Agreement was being considered and when the Bill to enact the *First Nations Lands Management Act* was being considered. An earlier version of the latter Act ran into trouble as a result of its silence on the issue. More recently, the NWAC engaged the Minister of Indian Affairs and Northern Development on the subject as it affects the existing *Indian Act*. See, for example, *CBC News*, Saturday, 24 November 2001, "Women want to change the Indian Act" at <http://cbc.ca>.
23. Native Women's Association of Canada, *Matrimonial Property Rights* (Ottawa, 1991); M.A. Erickson, "Where are the Women? Report of the Special Representative on the Protection of First Nations Women's Rights," 12 January 2001.
24. Erickson, "Where are the Women?"
25. *First Nations Land Management Act*, s. 6(1)(f).
26. Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa, 1995).
27. *Connolly v. Woolrich and Johnson* (1867) 17 R.J.R.Q. 75 (Q.S.C.), affirmed [1869] 1 R.L. 253; *Manychief v. Poffenroth* (1994), 25 Alta. L.R. (3d) 393 (Alta. Q.B.).
28. See, for example, J.Y. Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996), 23 *Manitoba Law Journal* 1; P.A. Monture-Okanee, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992), 56 *Saskatchewan Law Review* 237; M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993), 6 *Canadian Journal of Women and the Law* 174.