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Lessons From History: The Recent Applicability of Matrimonial Property and Human Rights Legislation on Reserve Lands in Canada

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Lessons From History: The Recent Applicability of Matrimonial Property and Human Rights Legislation on Reserve Lands in Canada

Abstract
The 1986 decisions Derrickson v Derrickson and Paul v Paul highlighted the legislative gaps in the Indian Act with respect to the division of on-reserve matrimonial property. Provincial family property legislation could not apply to account for the absence of matrimonial land rights provisions in the federal Indian Act. This is because the Supreme Court of Canada rigidly applied the doctrine of interjurisdictional immunity. Indigenous women have been disproportionately affected by the lack of on-reserve matrimonial real property provisions. The recent enactment of the Family Homes on Reserves and Matrimonial Interests or Rights Act (MIRA) is meant to finally address the absence of matrimonial real property provisions in the Indian Act. The MIRA allows band councils to enact their own matrimonial property laws and provides default federal rules for band councils that do not enact their own provisions. This article examines possible post-separation outcomes that may arise under the MIRA. It suggests the challenges that Indigenous women will face seeking redress under the MIRA will likely parallel the historical challenges they continue to face in disputes regarding status discrimination. It also suggests potential remedies for addressing discriminatory outcomes that may arise under this legislation. This paper ultimately emphasizes the importance of consultation with Indigenous women when enacting laws under the MIRA, and the importance of the Canadian Human Rights Tribunal as a forum for drawing attention to the larger problems regarding the division of property on-reserve that the MIRA alone fails to address.

Keywords
human rights; Charter; status discrimination; enfranchisement; family property; matrimonial home; reserve; Aboriginal title; Certificate of Possession; domestic violence; real property; interjurisdictional immunity

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LESIONS FROM HISTORY: THE RECENT APPLICABILITY OF MATRIMONIAL PROPERTY AND HUMAN RIGHTS LEGISLATION ON RESERVE LANDS IN CANADA

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OVERVIEW: SYSTEMIC STATUS DISCRIMINATION AND INDIGENOUS WOMEN’S VULNERABILITIES AS SPOUSES ON RESERVE LANDS

Indigenous women in Canada have consistently faced systemic racism and sexism since the arrival of settlers and the enactment of pre-Confederation “Indian” laws.¹ Today, they face more challenges establishing and accessing their rights than Indigenous men and do not receive the same legal protections afforded to other women in Canada. Until December 2014, there was no family property legislation that provided spousal entitlements after separation or divorce that applied on reserves. This changed with the enactment of the Family Homes on Reserves and Matrimonial Interests or Rights Act.² Prior to this change in legislation, Indigenous women were often denied the right to occupy or possess their matrimonial homes if their names were not on the Certificate of Possession following the breakdown of marital or common-law relationships or the death of a spouse. A Certificate of Possession on reserve lands denotes possession of real property, because reserve lands are communally held and therefore inalienable.³ As a result, Indigenous women were not statutorily entitled to half of the home’s value upon the breakdown of the relationship.⁴ In contrast, women in identical situations, but living off-reserve, have been able to access such remedies through provincial family property legislation.

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¹ See An Act to amend and consolidate the laws respecting Indians, SC 1876, c 18.
² Family Homes on Reserves and Matrimonial Interests or Rights Act, SC 2013, c 20 [MIRA].
³ Indian Act, RSC 1985, c1–5, s 20(2) [Indian Act]; A band council can grant an allotment of reserve land to band members that extends individual possessory rights over the allotment. This is recorded on the Indian Lands Registry. Certificates of Possession are evidence that band members hold certain allotments of reserve land. However, not every allotment is accompanied by a Certificate of Possession, since the holder may be required to pay for a land survey in order to obtain the Certificate from the band council. In Hepworth the cost of the survey was assessed at approximately $3,000. Since the jurisprudence discussed in this article and much of the literature use the term Certificate of Possession as though the Certificate itself extends possessory rights over allotments, this paper will use the term Certificate of Possession in the same way. See Tyendinaga Mohawk Council v Brant, 2014 ONCA 565, at para 21; Hepworth v Hepworth, 2012 NSCA 117, at paras 4, 8 [Hepworth].
⁴ [1986] 1 SCR 285 [Derrickson].
In addition to the economic hardship and safety concerns that often arise from this inadequate family property law regime, Indigenous women continue to experience the negative social and economic effects of status discrimination. The government officially recognizes Indigenous descent by applying “Indian Status” to individuals and recording this in the Indian Register.\(^5\) Status discrimination occurred through arbitrary and often gender biased eligibility criteria in the *Indian Act*,\(^6\) under which Indian Status was not always based on ancestry and could be lost through marriage. In the past, status discrimination has effectively prevented Indigenous women from attaining full participation in band council matters and, in some cases, from living on their home reserves during a time when Indian Status was a requirement to live on-reserve. The federal government eventually addressed status discrimination as a result of international pressure condemning the prejudicial status provisions in the *Indian Act* and their effects on Indigenous women. This pressure also drove the development of matrimonial property laws for reserve lands. Section 67 of the *Canadian Human Rights Act*\(^7\) shielded band council and federal government decisions made pursuant to the *Indian Act* from complaints of discrimination. Until its repeal in 2008, the only way for Indigenous women to address claims of discrimination was through Charter litigation that was often inaccessible and costly.

This paper illustrates the issues that arise when trying to address systemic problems through the courts. Because of jurisdictional constraints, the courts have often perpetuated harms, such as status discrimination, rather than resolved them. This paper analyzes historical legislation and jurisprudence regarding status discrimination, as well as Tribunal complaints after the repeal of s. 67 of the *CHRA*, to determine how issues likely to arise under the MIRA should be addressed. Litigation of status discrimination cases has not resolved these issues, but instead has highlighted those issues that subsequently generated reform. It was ultimately this legislative reform that extended status registration rights to many Indigenous women who were previously barred from obtaining or maintaining Indian Status. If the application of the MIRA leads to discriminatory outcomes—which is likely in light of gender disparities, housing shortages, and substandard housing on some Canadian reserves—litigation in the courts or the Canadian Human Rights Tribunal (“Tribunal”) will draw attention to issues in the legislation, including the need for increased funding for on-reserve housing. Litigation can prompt legislative reform as illustrated in the cases of status discrimination, but it will not itself accomplish the necessary changes. The repeal of s. 67 of the *CHRA* has recently provided the Tribunal with jurisdiction to hear discrimination complaints relating to matters on reserve lands and represents a step towards accomplishing these

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\(^5\) *Indian Act*, *supra* note 3, s 5.
\(^6\) *Ibid*.
\(^7\) RSC 1985, c H-6, s 2 [*CHRA*].
changes. This introduces another forum that can focus attention on the ways in which the MIRA provisions may result in inadequate and discriminatory outcomes, particularly for Indigenous women. Indigenous women experiencing problems accessing on-reserve housing are often highly vulnerable and in need of human rights protections. This paper suggests that the Tribunal must continue to exercise its broadened jurisdiction over matters of alleged discrimination on reserve lands in order to equally protect all people in Canada. The Tribunal must be able to address the on-reserve housing issues faced by Indigenous women following the breakdown of relationships. This will draw attention to the issue of funding for on-reserve housing and will facilitate change in terms of how on-reserve housing rights are determined post-separation.

I. THE LEGISLATIVE GAP IN ON-RESERVE PROPERTY LAWS AND ITS EFFECT ON INDIGENOUS WOMEN

The Constitutional doctrine of interjurisdictional immunity dictates that provincial legislation that touches upon a “core” or “vital” federal power is inapplicable insofar as it encroaches on federal authority. The Constitution Act 1867 separates provincial and federal powers. Property and civil rights are firmly entrenched under s. 92 provincial jurisdiction, while “Indians, and Lands reserved for the Indians” belong to the s. 91 federal head of power. The federal Indian Act, which has fully governed both Status Indians and reserve lands for over a century, is silent on many basic matters of property law, including how to deal with matrimonial real property upon the breakdown of a relationship. The result is a gap in federal legislation that provincial property laws cannot fill due to interjurisdictional immunity. The lack of matrimonial property provisions in the Indian Act, together with the inapplicability of provincial property laws to reserves, has resulted in Indigenous women having limited legal recourse in the division of on-reserve matrimonial property, and has led to inequitable results.

The Supreme Court of Canada (SCC) examined this legislative gap in Derrickson v Derrickson and Paul v Paul. In Derrickson, the SCC held that provincial laws could not substitute for the lack of matrimonial real property provisions in the federal Indian Act. The SCC addressed whether the provisions in British

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8 Irwin Toy Ltd v Quebec (AG), [1989] 1 SCR 927.
10 Ibid, s 91(24).
11 Indian Act, supra note 3.
12 Derrickson supra note 4 at para 89.
14 Derrickson, supra note 4 at para 96.
Columbia’s *Family Relations Act*\(^\text{15}\) concerning the right to ownership and possession of immovable property apply to reserve lands.\(^\text{16}\) Because Mr. Derrickson’s was the only name on the Certificates of Possession for the couple’s properties\(^\text{17}\)—a common arrangement due to colonial and patriarchal influences perpetuated by the *Indian Act*—Mrs. Derrickson could only receive a compensation order to adjust the family assets rather than one-half interest in the reserve properties upon their divorce.\(^\text{18}\) Writing for the Court, Justice Chouinard held that the implementation of *FRA* provisions would have allowed Mrs. Derrickson one-half of the net family assets but that the provisions in the *FRA* could not apply because the right to possession of lands touches on the “very essence” of federal authority under the *Indian Act*.\(^\text{19}\) The court recognized that framing this case solely as a question of jurisdiction could potentially have significant and detrimental consequences for Mrs. Derrickson.\(^\text{20}\) Acknowledging this problem, Chouinard J quoted legal scholar Peter Hogg, who wrote that “[w]hether such laws are wise or unwise is of course a much-controverted question, but it is not relevant to their constitutional validity.”\(^\text{21}\) As a result, provincial legislation that could address the absence of matrimonial property provisions in the *Indian Act* was deemed inapplicable on-reserve.

The SCC revisited the applicability of provincial property laws to reserve lands in *Paul*.\(^\text{22}\) Under s. 88 of the *Indian Act*, provincial laws of general application can apply on-reserve to the extent that they are consistent with the provisions in the *Indian Act*.\(^\text{23}\) In *Paul*, the SCC found that s. 77 of the *FRA*, which would allow the court to grant one spouse temporary exclusive occupation of the matrimonial home,\(^\text{24}\) was inconsistent with s. 20 of the *Indian Act*, which gives band councils (subject to the Minister’s approval) control over allotments of reserve land. Upon the parties’ second separation, Mrs. Paul was granted an order for interim exclusive occupation of the matrimonial home, pursuant to s. 77 the *FRA*, for herself and the three children of the marriage.\(^\text{25}\) This was overturned on appeal at the British Columbia Court of Appeal.\(^\text{26}\) The SCC held that Mr. Paul’s entitlement to the allotment, pursuant to s. 20 of the

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\(^{15}\) RSBC 1996, c 128, s 58 [*FRA*].  
\(^{16}\) *Derrickson*, *supra* note 4 at para 43.  
\(^{17}\) “Understanding Matrimonial Property Rights on Reserves” (November 2013) online: Ontario Women’s Justice Network <www.owjn.org/owjn_2009/> [OWJN].  
\(^{18}\) *Derrickson*, *supra* note 4 at para 87.  
\(^{19}\) *Ibid* at para 41.  
\(^{20}\) *Ibid* at para 81.  
\(^{21}\) *Ibid*.  
\(^{22}\) *Paul*, *supra* note 13.  
\(^{23}\) *Indian Act*, *supra* note 3, s 88.  
\(^{24}\) *FRA*, *supra* note 15, s 77. Provincial legislation including the *FRA* tends to use the term “matrimonial home”, while the *MIRA* uses “family home”. Both terms will be used throughout this paper.  
\(^{26}\) *Paul v Paul*, [1984] 12 DLR (4th) 462 (BCCA).
Indian Act, could not be altered by the provisions in the FRA that would allow Mrs. Paul interim exclusive occupation of the home because it touched upon the Parliamentary lawmaking authority over reserve land.  

In Paul, the SCC did not consider the circumstances that often lead female spouses to seek orders of interim occupation or exclusive possession of the matrimonial home. The case exemplifies the lack of protection that has historically been afforded to Indigenous women, particularly those who are victims of domestic violence. Mrs. Paul applied under s. 77 of the FRA “following repeated physical and verbal assaults” by her husband. These orders are important recourses in cases of domestic violence, especially when relying on support from friends and family or leaving the home for a shelter are not feasible. A 2013 Statistics Canada report, relying on data collected in 2009, states that the rate of self-reported violent victimization against Indigenous women, including spousal violence, was about 2.5 times higher than the rate for non-Indigenous women. The 1991 Report of the Aboriginal Justice Inquiry of Manitoba summarized the struggles of Indigenous women and their children in Canada as follows: “[A]boriginal women and their children suffer tremendously as victims in contemporary society. They are victims of racism, of sexism and of unconscionable levels of domestic violence. The justice system has done little to protect them from any of these assaults.” Although the SCC recognized the constitutional issue concerning provincial property laws and reserve lands in Derrickson and Paul, it fell short of prompting change to fix the legal gap due to the strict application of the doctrine of interjurisdictional immunity.

II. ADDRESSING THE GAPS: INTRODUCTION OF THE MIRA

It was nearly three decades after Derrickson before Parliament enacted...
legislation, the *MIRA*, to address the gaps in the *Indian Act* with respect to the division of matrimonial property. The creation of the *MIRA* began with the introductions of Bill C-47 in 2008, Bill C-8 in 2009, and Bill S-4 in 2010.\(^\text{32}\) Canada had received considerable international pressure to enact detailed provisions for the occupation and possession of family property on First Nations reserves. Parliamentary committee reviews of these issues resulted in the introduction of Bill S-2 in 2011,\(^\text{33}\) which eventually became the *MIRA*. Bill S-2 was introduced to increase protection for a spouse who was not named on the Certificate of Possession. It had provisions that prevented the person entitled to the allotment from selling the land without permission or from evicting the other spouse from the family home, and provided spouses with compensation if the rights to possession were transferred to a third party following the dissolution of the relationship.\(^\text{34}\)

Bill S-2 received Royal Assent on June 19, 2013 following “comprehensive consultation” with First Nations members and groups, including the Native Women’s Association of Canada (NWAC), and the Assembly of First Nations (AFN).\(^\text{35}\) This process of consultation was not as comprehensive as the government suggested; before the bill was passed, both the NWAC and the AFN alleged that many of their recommendations had not been adopted. Specifically, the government omitted two important and inter-related issues in the legislation: (1) the limited access on many reserves to lawyers and courts, and (2) the need for resources to help First Nations governments develop and implement alternative dispute resolution methods within their communities.\(^\text{36}\) Although the *MIRA* filled the legislative gap that provincial family property legislation could not, it still does not adequately address the realities of life on some reserves or the challenges the community residents may face when trying to access the legal resources required to pursue remedies under the *MIRA*.

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\(^{32}\) Indigenous and Northern Affairs Canada, “Backgrounder – Family Homes on Reserves and Matrimonial Interests or Rights Act” online: Government of Canada <www.aadnc-aandc.gc.ca/eng/1371645998089/1371646065699> [Backgrounder]. On-reserve real matrimonial property legislation was first introduced as Bill C-47, which was referred to the Parliamentary committee for review but died due to the dissolution of Parliament. Bill C-8 was awaiting continuation of a second reading debate in the House of Commons but died when Parliament was prorogued in December 2009. Bill S-4 received first reading in the House of Commons but died in March 2011 due to the dissolution of Parliament.


\(^{34}\) OWJN, *supra* note 17.

\(^{35}\) Backgrounder, *supra* note 32.

Part of the rationale behind creating reserves was to minimize land-use conflicts by segregating settler and Indigenous populations. As a result, reserves are often located in remote areas, which can pose challenges for residents who need to access courthouses and lawyers. This limited geographical access to family property law resources presents a serious access to justice issue, making the MIRA an ineffective solution. It is an instrument of family property law for reserve lands that residents may be unable to benefit from because they cannot access legal services.

**Modern Interpretation of Interjurisdictional Immunity and Aboriginal Title Lands**

Less than one year after the MIRA was enacted, the SCC significantly altered the concept of interjurisdictional immunity as it relates to Aboriginal title lands in *Tsilhqot’in Nation v British Columbia.*[^37] In this landmark case, the SCC declared that the Tsilhqot’in First Nation held Aboriginal title over land on which British Columbia had granted a commercial logging licence pursuant to the *Forest Act.*[^38] It was noted in *obiter dictum* that while the objective of the doctrine of interjurisdictional immunity is to enable both heads of power to operate freely within their respective jurisdictions, Indigenous rights and Aboriginal title limits federal and provincial authority.[^39] The Court further noted the doctrine should therefore not apply in cases where lands are held under Aboriginal title.[^40] Writing for a unanimous court, Chief Justice McLachlin stated,

> Provincial laws of general application, including the *Forest Act,* should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above.[^41]

As a result, *Tsilhqot’in* reframed the doctrine of interjurisdictional immunity as it pertains to reserve lands since *Derrickson.* Provincial matrimonial laws that comply with the criteria that Chief Justice McLachlin outlined could apply on reserves, leading to the question of whether the provisions in the MIRA are redundant.

Under the broad application of interjurisdictional immunity to Aboriginal title lands, it is plausible that the FRA provisions at issue in *Derrickson* and *Paul,* like the *Forest Act* in *Tsilhqot’in,* may be considered provincial laws of general application. The MIRA, then, may seem unnecessary. *Tsilhqot’in* suggests that provincial family law

[^37]: *Tsilhqot’in Nation v British Columbia,* 2014 SCC 44 [*Tsilhqot’in*].
[^38]: *Forest Act,* RSBC 1996 c 157.
[^39]: *Tsilhqot’in,* supra note 37 at paras 141, 151.
[^41]: *Ibid* at para 151.
legislation could apply equally on and off-reserve if family law legislation is not unreasonable, does not impose hardship, and does not unjustifiably deny “the title holders their preferred means of exercising their rights.”

42 Under s. 31 of the MIRA, courts are constrained in their ability to alter interests or rights to the family home. Considering the shift in judicial attitude towards the application of provincial laws on reserves, the real value of the MIRA provisions is the novel right they provide First Nations to enact their own matrimonial property laws as well as in the affirmation that provincial courts can alter occupancy and possessory rights on reserve lands in specific circumstances.

Ability of First Nation Governments to Enact Community-Specific Matrimonial Real Property Laws

The MIRA allows First Nations to enact their own laws and also provides a set of provisional federal rules in the event that a reserve community has not enacted matrimonial property laws.

44 Not all First Nations fall within the jurisdiction of the MIRA, and those that are eligible are still subject to procedural requirements. For a First Nations government to pass matrimonial real property laws respecting the use, occupation, and possession of the matrimonial home at the end of a relationship, and the division of the value of any property interests, at least 25 per cent of all eligible members of a First Nation must vote on the proposed laws.

45 The MIRA outlines additional procedural requirements, such as notifying the Attorney General before and after voting in new laws.

46 The MIRA also restricts which bands can fall under its jurisdiction; it excludes First Nations that have already elected to fall under the First Nations Land Management Act (LMA), as well as self-governing First Nations as defined in s. 12(3) of the MIRA. This is because a First Nation operating either under the LMA or as a self-governing First Nation must already have a land code including family property provisions in place.

Despite these exclusions, the MIRA rules still apply to the vast majority of reserves in Canada. As of May 23, 2014, out of a total of 617 First Nations communities, 36 have opted out of the land provisions in the Indian Act and are

42 Ibid. While Tsilhqot’in suggests family property law legislation could now apply on-reserve, provisions in family property laws regarding partition and sale would not apply because of the inalienability of reserve lands.

43 MIRA, supra note 2 at s 31.

44 MIRA, supra note 2, ss 7, 12.

45 MIRA, supra note 2, s 9(2).

46 Ibid, ss 7(3), 10.

47 First Nations Land Management Act, SC 1999, c 24, s 6(f) [LMA]; MIRA, supra note 2, ss 12(2), 12(3).

currently operating under the LMA,\textsuperscript{49} and only a handful are self-governed.\textsuperscript{50} However, many bands may face financial restraints that prevent them from enacting their own laws and from applying the federal provisional rules. In December 2013, Parliament announced only five million dollars of funding for the Centre of Excellence for Matrimonial Real Property.\textsuperscript{51} This is to span over a five-year period in order to assist the majority of First Nations that are eligible to enact their own laws under the MIRA.\textsuperscript{52} Hosted by the National Aboriginal Lands Managers Association (NALMA), this centre is the only organization created to assist First Nations governments in producing customized matrimonial property laws and to aid communities in adopting and implementing the federal provisional rules.\textsuperscript{53} This funding is inadequate for financially strained and geographically remote reserves where access to legal services and the courts is often infeasible. As a result of these restraints, applying the federal provisional rules may be challenging, and the financial barriers involved in drafting complex legislation can limit the ability of First Nations to develop their own laws.

Provisional Federal Rules Applying to Matrimonial Real Property on Reserves under the MIRA

Most of the MIRA is comprised of the default federal rules.\textsuperscript{54} Section 13 gives each spouse or common-law partner an equal right to occupation of the family home during the relationship. Section 14 provides that after the death of one spouse, the survivor has an automatic right to stay in the home for 180 days, regardless of the individual’s Indian Status, whether he or she has legal possessory rights, or is a member of the First Nation. In order to dispose of or encumber the family home, the individual with legal possession must obtain his or her partner’s free and informed consent in writing.\textsuperscript{55} The legislation also considers emergency protection orders: upon \textit{ex parte} application to the court, a provincial judge may make an emergency protection order for


\textsuperscript{52} Ibid.

\textsuperscript{53} Centre of Excellence for Matrimonial Real Property (2014), online: <www.coemrp.ca/> at Home, About.

\textsuperscript{54} See generally \textit{MIRA, supra} note 2, ss 13-52.

\textsuperscript{55} Ibid, s 15(1).
up to 90 days, subject to extension, that compels one partner to vacate the family home.\textsuperscript{56} When determining whether an order should be granted, the judge must consider a number of factors, including the nature and history of family violence and the best interests of any children. The court may also grant an order of exclusive occupation of and reasonable access to the family home, or an interim order on similar grounds, regardless of whether the applicant is a Status Indian or band member.\textsuperscript{57} Sections 28 and 29 provide that, when a relationship ends, each partner is entitled to one half of the value of the interest in the family home held by at least one of the partners at the valuation date.\textsuperscript{58} The court can order lump sum or installation payments of the amount payable, or, if the transferee is a band member, the transfer of the interest or right in the matrimonial home.\textsuperscript{59}

There are, however, substantial problems with these provisional federal rules. In order for these rules to be effective, potential applicants must be able to access lawyers and the court system, which is particularly difficult in rural and remote areas.\textsuperscript{60} Perhaps more importantly, and especially where family violence is at issue, peace officers must be present to enforce orders for exclusive interim occupancy of the matrimonial home on reserves. This poses an issue because reserves are often remote, sometimes with limited, seasonal road access, or fly-in only access. Further, language and communication issues, low literacy, and unemployment or under-employment are common realities on some reserves and act as access-to-justice barriers; these factors increase the vulnerability of those seeking the legal protections of the federal provisions, since they may not have the knowledge or resources required to pursue self-help options.\textsuperscript{61} In light of the fact that some reserves face severe housing shortages and high poverty rates, there are many potential barriers to enforcing the payment of half of the value of the interest in the family home, even if it is court-ordered.\textsuperscript{62}

\textsuperscript{56} Ibid, ss 16-17(8).
\textsuperscript{57} Ibid, ss 20(1)–20(2).
\textsuperscript{58} Ibid, s 28-29.
\textsuperscript{59} Ibid, ss 30(1), 31.
\textsuperscript{61} Access to Legal Information, \textit{supra} note 60 at 15.
III. HISTORICAL DEVELOPMENTS IN STATUS DISCRIMINATION LITIGATION: A WAY TO INFORM FUTURE LITIGATION UNDER THE MIRA?

The fight for gender equity upon matrimonial breakdown under the MIRA may parallel Indigenous women’s long and halting journey toward full recognition of their Indian registration rights, or “Indian Status.” Examining how the legal system has dealt with status disputes can help address the real property disputes that are likely to arise from the MIRA. Historically, litigation involving Indian Status has been an ineffective instrument for addressing systemic problems. Litigation in courts and through the Canadian Human Rights Tribunal highlights the germane issues, but cannot solve them. Considering how the courts have applied human rights law to status discrimination issues can illustrate how they will address potential human rights complaints arising out of the MIRA. While the Tribunal has not yet proven particularly advantageous for Indigenous women seeking to redress status discrimination, human rights complaints remain another avenue open to Indigenous women who want to bring housing issues arising under the MIRA to the attention of a wider community. Although Indigenous women seeking redress for status discrimination have not generally benefitted from bringing forth status discrimination issues at the Tribunal, the Tribunal nevertheless remains an important avenue for Indigenous women to raise awareness of housing issues under the MIRA.

The Concept of “Indian Status” and the Prejudicial Enfranchisement of Indigenous Women

Early legislative definitions of who qualified as “Indian” were broad and vague. These definitions, coupled with the enfranchisement laws—laws through which Indigenous people could voluntarily give up or involuntarily lose this status—that were in place by 1857, were particularly prejudicial to Indigenous women. From their inception, these laws contained inherent gender biases, since whether or not one was legally considered “Indian” applied differently according to one’s gender. For example, if a male Indian elected to become enfranchised, his wife and children automatically became enfranchised—his wife could not regain status except through widowhood and subsequent remarriage to a Status Indian man. In contrast, women could not elect to become enfranchised independently, in the absence of marriage to a Non-Status Indian man. A consequence of marriage to a Non-Status Indian man was that any subsequent

64 An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, 3rd Sess, 5th Parl, 1857, cl 8 (assented to 10 June 1857), SC 1857 c 26, at para VIII.
65 Ibid, VIII; see also IV for eligibility criteria.
children could not obtain Indian Status. The children of Status Indian men who married Non-Status Indian or non-Indigenous women did not face this legal barrier—Indian Status was passed to the wife and all children of the marriage. The modern iteration of the Indian Register and the term “Status Indian” are legal constructs that arise from the application of the Indian Act and do not necessarily reflect ancestral heritage. Regardless, legal status remains important to many Indigenous people because of the conferred benefits and feelings of cultural identity and belonging that it offers. In the wake of colonialism and persistent assimilation efforts, women have disproportionately felt the effects of status discrimination.

**Introduction of Bill C-31 and Bill C-3 Amendments to Status Provisions in the Indian Act**

Criticisms from Indigenous women and advocacy groups regarding the discriminatory status provisions intensified after the government introduced amendments to the Indian Act in 1951. One amendment provided registration rights to any wife or widow of a Status Indian man, even though an Indian woman who married a non-Indian man (either a Non-Status Indian man in Canada or an American Indian) was no longer entitled to her status or to live on-reserve, even if she was born and grew up there. Another confounding amendment is often referred to as the “double mother” clause. It stated that a person whose parents married on or after September 4, 1951, and whose mother and paternal grandmother had not been recognized as Status Indians before marriage, could register as a Status Indian at birth and until his or her twenty-first birthday, after which both status and band membership would be revoked.

The impact of these discriminatory provisions did not improve with litigation, which failed to achieve substantive change for the status recognition of Indigenous women. This was exemplified in Canada (AG) v Lavell, where the SCC held that the Canadian Bill of Rights could not overrule discriminatory provisions in the Indian Act. However, litigation was effective in drawing international attention to

66 See An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act, 31st Victoria, c 42, SC 1869, c 6, 32-33 Vict, s 6 (This Act stated that “any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act”).
68 Status and Membership Issues, supra note 63 at 2-4.
69 Indian Act, SC 1951, c 29, 15 Geo VI, s 12(1)(b).
70 Status and Membership Issues, supra note 63 at 3-4; ibid at s 12(1)(a)(iv).
71 Canada (AG) v Lavell, [1974] SCR 1349 at 1388-1389.
72 SC 1960, c 44.
discriminatory status practices. In the 1981 United Nations Human Rights Committee (Committee) decision of *Lovelace v Canada*, the complainant, Sandra Lovelace, lost her Indian Status and the right to live on reserve after “marrying out.” The Committee determined that by denying her the right to live on her home reserve after her divorce, s. 12(1)(b) of the *Indian Act* contravened article 27 of the *International Covenant on Civil and Political Rights*, because it was unreasonable and discriminatory. This favourable—though unenforceable—ruling, as well as the introduction of s. 15 equality rights under the *Canadian Charter of Rights and Freedoms* in 1985, led to the amendment of the *Indian Act* through Bill C-31, which received Royal Assent on June 28, 1985.

Broadly, the aims of Bill C-31 were to amend the discriminatory registration provisions in the *Indian Act* and to restore Indian Status to persons who had lost or never been entitled to it due to the operation of enfranchisement laws. This was ostensibly achieved through the newly introduced ss. 6(1) and 6(2) of the *Indian Act*. While both s. 6(1) and s. 6(2) grant registration rights to individuals who could not previously obtain or maintain Indian status, whether or not these individuals can pass Indian Status on to their children depends on which subsection they are entitled to register under. Section 6(1) continues entitlement for those already registered and confers registration rights to women who lost status through marriage, children of enfranchised women, and persons not registered under the “double mother” clause. Under s. 6(2), a person with at least one parent entitled to s. 6(1) registration can register, but they cannot register if the parent is only entitled to s. 6(2) registration. A person registered as an Indian under s. 6(1) who marries a Non-Status person can pass s.

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75 *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [Charter].
77 Borrows, supra note 74 at 840.
78 Library of Parliament Legislative Summary, *Bill C-3: Gender Equity in Indian Registration Act*, by Social Affairs Division: Mary C Hurley & Tonina Simeone, (2010 revised 2010) at 3-5 [Bill C-3 Legislative Summary].
79 Status and Membership Issues, supra note 63 at 5 (Section 6(1) continues entitlement for those already registered and confers registration rights to “women who lost status through marriage, children enfranchised as a result of their mother’s marriage, persons not included in the register under the ‘double mother’ clause, and illegitimate children of Indian women born prior to 14 August 1956”); *Indian Act*, supra note 3 at s 6(1).
80 Status and Membership Issues, supra note 63; *Indian Act*, supra note 3 at s 6(2).
6(2) registration rights to their children, but a person who is registered under s. 6(2)
cannot: this is the “second generation cut-off rule.”\textsuperscript{81} Within five years of Bill C-31’s
introduction, the population of “Status Indians” increased by 19 per cent, and by 1995
over half of the persons added to the “Status Indian” population were women and
girls.\textsuperscript{82}

However, the legislation nonetheless preserved inequalities. This was seen in
\textit{McIvor v Canada (Registrar, Indian and Northern Affairs)}.\textsuperscript{83} Sharon McIvor contended
that because of the registration provisions in place prior to 1985, which discriminated
against individuals on the basis of whether they were of matrilineal or patrilineal Status
Indian descent, the second generation cut-off rule continued to favour the male line of
descent. Because Ms. McIvor was a Status Indian who had married out prior to 1985,
her son was only entitled to s. 6(2) registration under the Bill C-31 amendments, and
her grandchild was not eligible to register at all. The effect of this differential treatment
of Ms. McIvor’s grandchild was found to contravene equality rights under the \textit{Charter},
and as a result the Court gave Parliament one year to amend the offending \textit{Indian Act}
provisions.\textsuperscript{84} The legislative result was Bill C-3, the \textit{Gender Equity in Indian
Registration Act}, which came into force in January 2011 and permitted registration
rights to the grandchildren of women who lost status as a result of marrying Non-Status
Indian men.\textsuperscript{85} The Department of Aboriginal Affairs and Northern Development Canada\textsuperscript{86}
projected that an additional 45,000 persons would become entitled to Indian Status
as a result of Bill C-3.\textsuperscript{87} However, according to a report issued under the
authority of the Minister of Indian Affairs and Northern Development, “[a]fter two
generations, Bill C-31 inheritance rules (in concert with out-marriage) are expected to
result in a rapid decline in the population entitled to registration,” and “[p]rojection
trends suggest that sometime around the end of the fifth generation, no further children
will be born with entitlement to Indian registration.”\textsuperscript{88} This can be attributed to the
effects of the second generation cut-off rule. Undoubtedly, the total erasure of status

\textsuperscript{81} NWAC Guide to Bill C-31, \textit{supra} note 76 at 12.
\textsuperscript{82} Borrows, \textit{supra} note 74 at 840.
\textsuperscript{83} \textit{McIvor v Canada (Registrar, Indian and Northern Affairs)}, 2009 BCCA 153 [\textit{McIvor}].
\textsuperscript{84} \textit{Ibid} at paras 160, 161, 165, 166; Bill C-3 Legislative Summary, \textit{supra} note 78 at 5.
\textsuperscript{85} \textit{Gender Equity in Indian Registration Act}, SC 2010 c 18 [\textit{GEIRA}]; see also Indigenous and Northern
Affairs Canada, \textit{Gender Equity in Indian Registration Act}, online: Government of Canada <www.aadnc-
aandc.gc.ca/eng/1308068336912/1308068535844>.
\textsuperscript{86} Now, “Department of Indigenous and Northern Affairs Canada.”
\textsuperscript{87} Indigenous and Northern Affairs Canada, “Report to Parliament - Gender Equity in Indian Registration
\textsuperscript{88} Indigenous and Northern Affairs Canada, “Re-assessing the Population Impacts of Bill C-31”, by
Stewart Clatworthy, under the authority of the Minister of Indian Affairs and Northern Development
(Ottawa: INAC, 2004), online: Government of Canada <www.aadnc-
aandc.gc.ca/eng/1313157003056/1313157171958> at ix.
among Indigenous people was not the goal that Indigenous women activists had campaigned for when attempting to remove gender prejudices in eligibility criteria.

**Repeal of s. 67 of the Canadian Human Rights Act**

The stated purpose of the *Canadian Human Rights Act* (CHRA) is “to give effect…to the principle that all individuals should have an opportunity equal with other individuals…without being hindered…by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, [or] disability.” The CHRA allows an individual to bring a claim against a party who denied him or her access to any good, service, facility, or accommodation, or that differentially treated him or her, resulting in adverse consequences. The original version of the CHRA contained s. 67, which unequivocally stated that none of its provisions applied to the discriminatory provisions in the *Indian Act*. Section 67 had the effect of “shielding” band council or government decisions made pursuant to the *Indian Act* from the CHRA’s anti-discrimination provisions and from litigation through the Tribunal. This frustrated human rights complaints regarding the registration provisions under s. 6 of the *Indian Act* as well as the land allocation and by-law provisions under ss. 20 and 81, respectively. When s. 67 was repealed, the decisions of band councils and the federal government were no longer immune from the Tribunal’s scrutiny. While this had unstable results for cases addressing status discrimination, the Tribunal’s new jurisdiction was still important as a new forum to hear cases of discriminatory outcomes that resulted from federal government and band council decisions. Although the Tribunal’s decisions regarding status discrimination were not helpful on those grounds, it can be an invaluable forum for prompting change for any problems arising out of the MIRA.

The Tribunal is an important forum for addressing cases of discrimination: while s. 15 Charter claims can and have been used to address discrimination resulting from the *Indian Act*, this option is not particularly accessible. Pursuing a Charter claim is often a longer, more difficult, and more expensive process than bringing a complaint to the Tribunal. The Court Challenges Program, which helped fund lawsuits for

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89 *CHRA*, supra note 7, s 2.
91 See *Canadian Human Rights Act*, SC 1976-1977, c 33, s 67 [*CHRA (1977)*]. This was amended by *An Act to amend the Canadian Human Rights Act*, SC 2008 c 30, s 1 [*CHRA Amendment 2008*].
93 *Ibid* at 15.

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Canadians wishing to bring Charter cases to court, was discontinued in 2006,\(^95\) disadvantaging Indigenous women. The Court Challenges Program funded lengthy and costly—but ultimately ground-breaking—litigation, including the case of McIvor, which resulted in substantial changes to the applicable legislation.\(^96\)

Bill C-21 was introduced in 2008 to amend the CHRA by repealing s. 67.\(^97\) When this bill received Royal Assent, however, it only superficially rectified the discriminatory practices that persisted under s. 67. After Bill C-21 became law, the Tribunal had jurisdiction to hear complaints based on status discrimination and began to do so with the case of Matson et al v Indian and Northern Affairs Canada.\(^98\) In Matson, it became apparent that, with the introduction of Bill C-31, the federal government was “giving with one hand and taking with the other.”\(^99\) The Tribunal ruled that the non-conferral of Indian Status was not the same as denying a “service” that would normally bring about the application of the CHRA.\(^100\) However, as receiving benefits from the government is equivalent to qualifying for and receiving a government service, it can be argued that the benefits provided to Status Indians upon registration under the Indian Act are analogous to qualifying for and receiving a government service.\(^101\) This reasoning continued in the 2013 case of Andrews v Canada, where the Tribunal held that the CHRA could not apply to the Indian Status provisions in s. 6 of the Indian Act because Parliamentary law-making was not a “service,” despite the fact that the legislation grants government benefits to eligible persons.\(^102\)

The Tribunal partially diverged from these precedents in the 2014 decision of Beattie et al v Aboriginal Affairs and Northern Development Canada\(^103\) when it ruled that the Indian Registrar discriminated against the complainant on the basis of family status by refusing to recognize her entitlement to registration through her Indigenous custom adoptive parents. Subsequently, the complainant’s grandchildren were ineligible for registration. Had the Registrar recognized Beattie’s right to register for Indian

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\(^97\) CHRA Amendment 2008, supra note 91.

\(^98\) Matson et al v Indian and Northern Affairs Canada, 2013 CHRD 13 [Matson].

\(^99\) Canadian Human Rights Reporter “Giving with One Hand, Taking with the Other”, Case Comment on Matson et al v Indian and Northern Affairs Canada, 2013 CHRT 13.

\(^100\) Ibid.

\(^101\) Ibid.


\(^103\) Beattie et al v Aboriginal Affairs and Northern Development Canada, 2014 CHRT 1 at para 97 [Beattie].
Status, Beattie’s children would have had s. 6(1) registration rights as opposed to s. 6(2), thereby granting s. 6(2) registration rights to her grandchildren. 104 Although the Tribunal recognized Indian Status eligibility as a public service in Beattie, the Tribunal distinguished it from Matson and Andrews. The latter cases challenged the discriminatory provisions in the Indian Act, whereas Beattie challenged a government employee’s exercise of discretion in assigning Indian Status rights. 105 Beattie was only a partial victory for Indigenous women, since the Tribunal did not address the issue of whether the s. 6 eligibility criteria were discriminatory.

An important step toward correcting the continued status discrimination of Indigenous women is to strike down this cut-off rule and reinstate status for those who lost it as a result of the rule. The Tribunal’s decisions in Matson and Andrews were affirmed in the 2015 judicial review case of Canada (Human Rights Commission) v Canada (Attorney General), 106 which addressed the discriminatory nature of the second generation cut-off rule. The Federal Court reiterated the Tribunal’s conclusions that Indian Act registration rights were not considered a service and therefore not within the jurisdiction of the Tribunal. 107 This conclusion was reached despite the Tribunal’s opposite conclusion in Beattie. The Federal Court decision stated that “[p]rior to the Charter, the new CHRA would have been the only means of challenging the Indian Act provisions as discriminatory”; now, the appropriate forum is a Charter challenge. 108

While the Tribunal and Federal Court decisions have had irregular results concerning these cases of status discrimination, the outcomes of these cases suggest the Tribunal may be a more promising forum for litigation involving the MIRA. 109 While the Federal Court in Canada insisted status discrimination disputes should be fought as Charter claims because it was unconvinced that conferring Indian Status is a service (therefore falling under the ambit of the CHRA), neither the Federal Court nor the Tribunal can deny the Tribunal’s jurisdiction over housing matters. Since housing falls under s. 5 “accommodation” of the CHRA, the repeal of s. 67 will directly open up housing concerns to the Tribunal’s scrutiny. In the absence of the Court Challenges Program to help fund Charter claims, and as a forum to prompt effective change as in McLvor, the Tribunal is paramount for hearing single cases of housing discrimination.

104 Canadian Human Rights Reporter, “Determining Eligibility for Indian Status is a Service After All”, Case Comment on Beattie et al v Aboriginal Affairs and Northern Development Canada, 2014 CHRT 1.
105 Beattie, supra note 103 at paras 96-99.
106 Canada (Human Rights Commission) v Canada (Attorney General), 2015 FC 398 [Canada].
107 Ibid at paras 3, 122, 123.
108 Ibid at para 122.
109 For a recent example of the Tribunal’s willingness to find on-reserve discrimination in other matters see First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (finding that the federal government discriminates against Indigenous children living on-reserve by failing to provide the same level of child welfare services that exist elsewhere in Canada).
IV. ISSUES LIKELY TO ARISE FROM THE APPLICATION OF THE MIRA

Even before Parliament passed Bill S-2 (MIRA), the legislation had notable issues and oversights. Oversights included the inaccessibility of the court system and peace officers for remote reserves, and the severe housing shortage that often resulted in members of a couple’s extended family living with them.110 These issues further complicate the splitting of assets, such as the matrimonial home, upon separation. It is difficult to directly assess core-housing needs on reserves because housing costs are often managed through band housing arrangements. Consequently, cost and affordability data cannot be captured. However, it is still possible to determine the adequacy and suitability of existing reserve housing.111

A 2006 census conducted by Canada Mortgage and Housing Corporation (CMHC) found that 53 per cent of Indigenous people in reserve households lived in homes that either needed major repairs, were too crowded, or both.112 In contrast, the identical situation applied to only 13 per cent of all households in Canada.113 Band housing was the most likely to be substandard, with 60 per cent of homes considered unacceptable by CMHC, and also more likely to be crowded.114 Overall, from 2001 to 2006, the unsuitability of on-reserve housing increased from 28 per cent to 33 per cent, largely due to the increase in the need for major repairs and the insufficiency of income streams to access appropriate alternative living arrangements.115 The extensive poverty that exists on some reserves is integrally linked to these housing concerns.116 Poverty on reserves is closely tied to the legacy of colonialism, the continuing jurisdiction of the federal government over Status Indians and reserves, and the underfunding of basic services on-reserve. Since the federal government exerts more direct control over the lives of Status Indians and Indigenous people living on-reserve, and as Status Indian children are almost twice as likely to live below the poverty line,117 there is an inherent

112 Ibid at 9.
113 Ibid.
114 Ibid at 10.
115 Ibid at 113.
116 David Macdonald & Daniel Wilson, Poverty or Prosperity: Indigenous Children in Canada (Ottawa: Canadian Centre for Policy Alternatives, 2013) [Poverty or Prosperity].
117 Ibid at 10. This is evidenced by the three tiers of children living in poverty in Canada: the first tier, which excludes Indigenous, racialized and immigrant children, has a poverty rate of 12 per cent; the second tier includes racialized children, who experience poverty at a rate of 22 per cent, first generation immigrant children, with a poverty rate of 33 per cent, and a subdivision of Métis, Inuit and Non-Status First Nations children, who experience a poverty rate of 27 per cent; and the third, which is comprised entirely of Status Indian children, has the most disgraceful statistic of all, with a full 50 per cent of children living below the poverty line.
issue with the federal control of Indigenous matters.

Further compounding access-to-justice, housing, and poverty issues are the educational circumstances of many First Nations people: nearly 60 per cent of Status Indian parents do not have a high school education, while 75 per cent of non-Indigenous adults from similar low-income households with children do.\textsuperscript{118} Lower levels of education makes it more likely that Indigenous women who could avail themselves of protections under the \textit{MIRA} will have “difficulty understanding the meaning and use of law and court processes.”\textsuperscript{119} This is because “[m]ost of these processes, conceived by and for the non-Aboriginal Canadian population have yet to be adapted and made sensitive to Aboriginal women’s cultures, values, life perspectives, and realities.”\textsuperscript{120}

While s. 16 of the \textit{MIRA} allows an applicant to make an \textit{ex parte} application for exclusive occupation, this right is rendered meaningless if it cannot be enforced. The need for enforcement measures in the \textit{MIRA} is particularly important in cases where an abusive spouse refuses to leave the matrimonial home. Emergency temporary shelter for abused women and their children is not generally available on reserves, since space is limited.\textsuperscript{121} Often, the lack of alternative shelter forces one spouse to leave the community to find housing; this is particularly likely in situations of domestic violence.\textsuperscript{122} The communal nature of reserve lands\textsuperscript{123} means that a court cannot order the partition and sale of a matrimonial home on a reserve in order to enforce the matter of compensation for the spouse who is not in legal possession of the home.\textsuperscript{124} This limitation, coupled with the systemic poverty that exists on some reserves, makes it less likely that an individual who is entitled to half of the value of the matrimonial home will actually receive this payment from the former spouse.

In the absence of a provision to ensure compensation, s. 16 of the \textit{MIRA} is largely meaningless.\textsuperscript{125} Even if the entitled spouse could receive payment for his or her

\textsuperscript{118} \textit{Ibid} at 20.
\textsuperscript{119} Native Women’s Association of Canada, \textit{Background Document on Aboriginal Women and Housing for the Canada-Aboriginal Peoples Roundtable Sectoral Follow-up Session on Housing}, (Ottawa: Native Women’s Association of Canada, 2004) at 5 [NWAC Women’s Housing].
\textsuperscript{120} \textit{Ibid}.
\textsuperscript{121} CHRC Annual Report, \textit{supra} note 51 at 30-31.
\textsuperscript{122} NWAC News Release, \textit{supra} note 36 at 1.
\textsuperscript{123} \textit{Indian Act}, \textit{supra} note 3, s 20. Certificates of Possession issued under s 20 of the \textit{Indian Act} by band councils are only evidence of entitlement to possession of an allotment of reserve land, not ownership of the property.
\textsuperscript{124} Katie Hyslop, “Feds Impose New Marriage Property Law on Reserves”, \textit{The Tyee} (19 December 2013), online: <thetyee.ca/>.
\textsuperscript{125} See \textit{MIRA}, \textit{supra} note 2 at s 7, 16, 52. While the \textit{MIRA} makes provision for the enforcement of orders under s 7(2)(b) and s 52, this is no real guarantee that a compensatory order requiring the payment of an equalization sum will be fulfilled. While s 52(2) allows the court, on application, to vary an order for compensation so that it is paid into the court, given the reality of unemployment, under-employment, and
interest in the matrimonial home, this does not mitigate the housing shortages on reserves. These shortages still force many individuals to move off-reserve to find affordable housing. Further, the issue of valuation of the right or interest in the matrimonial home is problematic, because the *MIRA* is vague as to how a “reasonable” value is to be ascribed or determined between a potential “buyer” and “seller” on inalienable reserve land. The 2012 case *Hepworth v Hepworth* exemplifies the inherent problems with the valuation of homes and land allotments in First Nations communities. In *Hepworth*, the matrimonial home was appraised in 2008 at a market value of $127,000, or a replacement value of $98,818 after accounting for depreciation. At trial, a band councillor, Mr. Johnson, testified that the highest price known to him for a transfer to another band member was $40,000. The trial judge doubled the value to $80,000 as the starting point to ensure a more suitable monetary award. The Nova Scotia Court of Appeal restored the original attributed value of $40,000 for the purposes of determining the equalization sum to be paid to Ms. Hepworth pursuant to the provincial legislation regarding the division of matrimonial assets.

With these issues in determining the value of the matrimonial home, and the likelihood that a low monetary value will be ascribed to it for the purposes of spousal property division, the *MIRA* federal provisional rules may result in inadequate compensation for one spouse. Combined with the lack of suitable housing on some reserves that forces some band members to seek housing off-reserve, this valuation issue can mean that one spouse—usually the wife—is left with little choice but to live in unsatisfactory accommodations, sometimes resulting in tragic outcomes. Therefore, appropriate forums, such as the Tribunal, are important, not only for enforcement, but also for drawing national and international attention to these issues.

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127 *Hepworth, supra* note 3 at para 10.
128 *Ibid* at para 46.
129 *Ibid* at paras 48 and 49.
130 *Ibid* at para 50.
131 See *Hepworth, supra* note 3.
132 NWAC Women’s Housing, *supra* note 119 at 1. An Indigenous woman was forced to leave her home reserve with her five children due to a chronic housing shortage, but was still unable to find affordable housing. In order to obtain more suitable housing than the run-down accommodations she had been able to secure, the woman sought help from the authorities. As a result of her seeking assistance, her children were apprehended and the woman later committed suicide.
V. THE CANADIAN HUMAN RIGHTS TRIBUNAL: A CATALYST FOR RESOLVING ISSUES UNDER THE MIRA

Before s. 67 of the CHRA was repealed, the actions of the federal government and First Nation governments were shielded from Canadian human rights laws if they were construed to directly touch upon matters governed by the Indian Act. This prevented scrutiny of decisions made pursuant to the Indian Act regarding s. 6 Indian Status, land allocation under s. 20, and also protected the by-laws that band councils can create under s. 81. As demonstrated by the Tribunal’s jurisprudence on status discrimination resulting from the Indian Act, the repeal of s. 67 has had tangible, albeit sub-par, results for Indigenous people. Further, as noted above, there is a high probability that inequities will arise from the application of the MIRA provisional federal rules. The fact that the courts cannot always permanently alter interests or rights in allotments on reserve lands, combined with the housing and shelter shortages, suggests that the MIRA can do little to mitigate the likelihood of homelessness for the spouse who is denied possessory rights to the land on which the family home is located.

While bringing grievances regarding discrimination in housing and accommodations to the Tribunal is less difficult than establishing the grounds for a Charter challenge, neither option is ideal for addressing future complaints. A Charter challenge is a long and expensive process, and the Tribunal has shown itself to be less than amenable to hearing cases of status discrimination, which may serve to deter complainants from alleging discriminatory outcomes under the MIRA in the future. Despite this, complaints about housing discrimination are more likely to gain traction with the Tribunal because “accommodation” is a protected ground under s. 5 of the CHRA. This stands in contrast to cases like Matson and Andrews, where the Tribunal did not have the jurisdiction to hear complaints of this nature, since the complainants challenged the legislative provisions rather than the denial of services. Further, the manner in which band councils and the federal government apply the provisions, rather than the provisions themselves, could become the subject of complaints to the Tribunal, since on-reserve housing clearly falls under the CHRA’s oversight regarding accommodations. This can result in a greater likelihood of the Tribunal hearing claims.

133 CHRA (1977), supra note 91 at s 67; Metallic, supra note 87 at 15.
134 Metallic, ibid.
135 See Beattie, supra note 104.
136 See generally, “Issues Likely to Arise from the Application of the MIRA,” above; Wingrove, supra note 110; NWAC News Release, supra note 36.
137 Canadian Human Rights Commission, A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act (Ottawa: Canadian Human Rights Commission, 2005) at 2; CHRA, supra note 7 at ss 6, 15 (regarding both commercial premises and residential accommodations, s 6 states that denying occupancy based on a prohibited ground “to any individual, or to differentiate adversely in relation to any individual” is a discriminatory practice that is only excused if it can be justified under s 15).
of discriminatory outcomes arising out of the MIRA.

CONCLUSION: A WAY FORWARD FOR INDIGENOUS WOMEN

The development of community-specific First Nations laws and community-based solutions to matrimonial property disputes are the most promising courses of action moving forward. These methods are likely the most efficient and cost-effective ways of dealing with conflicts following the breakdown of relationships, and they can be tailored to reflect the realities of life on reserves in ways that the federal provision rules cannot. To overcome the fiscal constraints for individual band councils and the challenges that they may face when drafting legislation, Indigenous organizations, such as the Union of Ontario Indians, should hire lawyers to assist clusters of communities wishing to enact their own similar laws. First Nations communities could thus collaborate when drafting laws to alleviate the potentially prohibitive financial burden that would otherwise fall upon each community seeking to develop a comprehensive set of matrimonial property provisions.

Communities must also fairly distribute adequate housing post-separation for partners that are both band members. However, the availability of funding and space on reserves may create barriers to assigning land. In addition, the MIRA valuation provisions only address property allotted with a Certificate of Possession, not “custom allotments.”138 Custom allotments refer to a system in which bands apportion land according to their traditional rules and customs.139 This reportedly makes up “50 per cent of all individually held lands on reserves throughout Canada.”140 Additionally, band-owned housing accounts for 66 per cent to 75 per cent of all on-reserve housing, meaning that individuals do not always have on-reserve accommodation through a Certificate of Possession or custom allotment.141 It therefore falls to First Nations governments to create provisions to provide adequate shelter within the community to address these inevitable problems; otherwise, residents may be forced to move away from their reserve. Indigenous women have disproportionately moved off-reserve in

138 MIRA FAQs, supra note 126. However, in accordance with the MIRA, it is within the discretion of a court or a First Nation to apply the provisional federal rules dealing with the division of value of matrimonial interests or rights to lands allotted according to custom. Hepworth, supra note 3, and the definition of “interest or right” in s 2(1) of the MIRA, supra note 2, also make it clear that courts are willing to include the value of an on-reserve family home in the calculation of an equalization sum in the absence of a Certificate of Possession for the allotment.

139 Indigenous and Northern Affairs Canada, Lands and Housing, online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1317228209993/1317228233782> [Lands and Housing].


141 Lands and Housing, supra note 139.
comparison to Indigenous men, and limited affordable housing off-reserve can result in tragic outcomes for women and their children.\textsuperscript{142}

As a result of colonialist practices in the application of the \textit{Indian Act}, individuals holding positions on band councils and Certificates of Possession have historically been similar: the majority have been men.\textsuperscript{143} This has led to discriminatory outcomes for women.\textsuperscript{144} Band councils must continue to hear the voices of Indigenous women and take their interests into account when making decisions for the community. The interests of women and children must be a critical factor to consider when determining alternative housing arrangements. Despite the \textit{MIRA} provisions, there is still a disproportionate number of Indigenous women encountering discriminatory on-reserve housing practices compared to Indigenous men, which can be attributed in part to their continued under-representation in matters of community decision-making and governance.\textsuperscript{145}

After the repeal of s. 67 of the \textit{CHRA}, it is likely that the Tribunal will receive complaints of discriminatory housing decisions made pursuant to the federal provisional rules or to a First Nation’s matrimonial laws. Indigenous women seeking redress for unfair outcomes under the new reserve family property provisions may now be able to bring a grievance to the Tribunal, although, thus far, this has proven to be an imperfect route for addressing status discrimination in Indian registration provisions. The Tribunal now has jurisdiction to hear claims arising from band council and federal government decisions, which can bring attention to housing inequalities between Indigenous women and men. However, even if the Tribunal is an effective resource for addressing housing discrimination, its decisions cannot improve poverty or the suitability or availability of reserve housing. Nevertheless, complaints brought forward to the Tribunal under the \textit{MIRA} rules will highlight the accommodations problems that are prevalent on some reserves. Bringing attention to these issues could prompt legislative reforms and increase funding for housing, carrying on the legacy of the ground-breaking Indigenous women who pursued status discrimination litigation and fundamentally altered how Indian Status is considered and assigned.

\textsuperscript{142} See note 124 \textit{above}.
\textsuperscript{143} Turpel, \textit{supra} note 28 at 31.
\textsuperscript{144} \textit{Ibid} at 3; see also Borrows, \textit{supra} note 74 at 838–39 for perspectives from Indigenous women and their struggles for gender equality and inclusion in band council matters. After Bill C-31 reinstated, or newly extended, registration rights for many women in 1985, Sandra Lovelace Sappier spoke of the struggle Indigenous women face, stating that, “[a] long time ago, before Christianity got in here, I think the men and women lived together equally. There was no discrimination. It was the women who chose their leader traditionally.” Lovelace continued: Indigenous men “were the ones always talking about ‘unity’, but they didn’t even want me back on the reserve and I was born here. I said … ‘we have to work together and be equal.’ He [sic] said, ‘You’re right.’ But do you think they would do it! Not yet.”
\textsuperscript{145} NWAC Women’s Housing, \textit{supra} note 119 at 1, 3, 5.