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## Matrimonial Real Property on Reserve in Canada

### 1. Introduction

Matrimonial property is commonly defined as the family home that a married couple resides in, although legally the term includes all items of material value acquired during the marriage. Matrimonial property includes real property, which is immovable, such as a house or land, and personal property, which describes those items that can easily be moved and are not attached to the land, such as clothing, vehicles, income, and savings. In this paper, *matrimonial real property* refers to the family home and land, and the *matrimonial property regime* refers to the laws or legislation regarding marital property.

Most First Nations are still subject to the *Indian Act*<sup>1</sup> on reserve land, which contains no provisions for dealing with spousal property rights during a marriage or upon its dissolution or divorce. The *Indian Act* falls under federal legislation, section 91(24) of the *Constitution Act, 1867*<sup>2</sup> ("the Constitution"), and therefore there are no federal provisions relating to divorce, custody, or matrimonial property because under section 92(13) of the *Constitution*, family law was deemed the exclusive domain of the provincial and territorial governments. While every province and territory has family legislation that applies off reserve, there are almost no provisions that apply to reserve land in the event of a divorce or separation. This means that for almost all Aboriginal people in Canada, there are no laws or remedies in the event of a breakdown of relationship. Further, there is often no fair or equitable division of assets. This gap in the matrimonial property regime has detrimentally affected Aboriginal communities.

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<sup>1</sup> R.S. 1985, c. I-5.

<sup>2</sup> (U.K.), 30 & 31 Victoria, c. 3.

This paper first examines the *Indian Act*, provincial family laws, and the case law regarding matrimonial property. It then analyzes the impact on Aboriginal communities by examining the pre-contact status of Aboriginal societies, traditional property rights and divorces, the imposition of colonization, and the ongoing affect on Aboriginal communities. Finally, it discusses recent reports and recommendations to this issue of matrimonial property on reserve. Future directions are examined, including legislative options such as amending the *Indian Act*, creating new federal laws, applying provincial family laws to reserves, and enhancing First Nations self-government powers.

**a. The *Indian Act***

Under the *Constitution*, Indians, and lands reserved for Indians, fall under federal jurisdiction. Accordingly, Indian reserves are held in trust for the benefit of the bands and cannot be owned individually by Aboriginal persons. However, band councils are able to issue an allotment of reserve land through certificates of possession to individual band members under section 20 of the *Indian Act*. Due to the complicated process of colonization, the certificates of possession have traditionally been issued to band member husbands, regardless of whose reserve land the matrimonial home is situated on.

Some band members hold their land on reserve through custom allotment<sup>3</sup> instead of through certificates of possession. Under custom allotment, a band provides land to its band members based on the customary or traditional practice (sometimes called family allotments).

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<sup>3</sup> Certificate of possession and custom allotment are the two primary ways of holding land. Other means of holding reserve land are through location ticket, no evidence of title issued, or notice of entitlement, which are all complicated topics and beyond the scope of this paper.

The *Indian Act* as it currently exists is silent on the issue of matrimonial property,<sup>4</sup> and one contentious issues stemming from the *Indian Act* is that of band membership. Some couples have status (recognized federally under the *Indian Act*) and membership (recognized by the band) on the same reserve. Other couples have only one spouse recognized with status but no band membership, and still others have only one spouse with band membership, but no status. Some families have their children recognized with federal status but not as band members; others have the opposite, the children as band members without federal status. And some Aboriginal people have children with neither band membership nor federal status. If an Aboriginal child in the latter case grows up to have a relationship and house on reserve, he or she stands to lose the house if the spouse is a band member with federal status. That is, in the event of a separation or divorce, the person with the recognized band membership will assume 100% of the marital property, and there are often few venues for recourse for the person without status or membership.

This issue becomes even more complicated for children of an Aboriginal parent and non-Aboriginal parent, as some are recognized as band members and some are not, often for discriminatory reasons.

### **b. Provincial family laws**

Every province and territory has laws that apply during marriage and after marriage, through separation and divorce (e.g., BC's *Family Relations Act*<sup>5</sup>). These laws speak to the spousal rights enjoyed by everyone off reserve.

The presumption in Canadian family law is that both spouses are entitled to an equal share of the marital assets. Generally speaking, one spouse cannot sell or give away a family home without the consent of the other, and there are certain remedies

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<sup>4</sup> Currently there are two ways in which Aboriginal peoples may opt out of the *Indian Act*: under the *First Nations Land Management Act*, S.C. 1999, c. 24, and under modern treaties or self-government acts. *FNLMA* or self-government lands are not reserve lands under the *Indian Act*. When considering matrimonial property under either system, each *FNLMA* or treaty land has to be considered and researched to see if it has its own unique matrimonial property laws (e.g., see Matrimonial Property Land Laws page on the First Nations Land Advisory Board website at <http://www.fafnlm.com/content/en/LandLaws.html> (accessed April 22, 2008).

<sup>5</sup> R.S.B.C. 1996, c. 121.

available, such as an injunction or order to prevent the sale of the home, or an order for temporary or permanent possession of the family home or other assets, if one of the spouses attempts to sell off the marital assets before the matter is resolved either by agreement or at a trial. These laws apply to both spouses regardless of whose name appears on the legal document to the family home. However, case law illustrates that these laws do not apply on reserve (see below).

Another issue addressed in some provincial legislation is the family structure. There is no uniform definition across Canada of what constitutes a family: some families consist of two people who are legally married, others live in a common-law relationship, and still others may be married by traditional custom or practice. Some of the provincial laws are silent on this aspect while others are detailed and specific. For the purposes of matrimonial property on reserve, the question of whether Aboriginal couples married by their own traditional laws are recognized as a “family” has major consequences for the distribution of matrimonial property.

### c. Canadian case law

The obvious question is whether the family legislation can apply on reserve. The Supreme Court of Canada in 1986 answered that question in two clear and unequivocal decisions on the same day in *Derrickson v. Derrickson* and *Paul v. Paul*. Both cases originated in British Columbia. The courts, in these two cases, emphatically stated that provincial family laws have no jurisdiction on reserve, which is federal jurisdiction.

#### *Derrickson v. Derrickson*<sup>6</sup>

Westbank First Nation members Rose Derrickson and her husband, William Derrickson, were in the midst of a divorce. Rose Derrickson applied under Part 3 of the BC *Family Relations Act* for a half-interest in the certificates of possession her husband held under section 20 of the federal *Indian Act*. The issues before the court were whether the property provisions of the *Family Relations Act* apply to an Indian reserve and whether the *Family Relations Act* is referentially incorporated by section 88 of the

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<sup>6</sup> [1986] 1 S.C.R. 285.

*Indian Act* so that compensation in lieu of an order directing division of property pursuant to section 52 (2)(c) of the *Family Relations Act* could be made.

The trial judge held that the provincial legislation is inconsistent with the federal *Indian Act* and is inapplicable to reserve lands. The judge also ruled that since there could be no division of the reserve land, there could be no determination of “what would be unfair” and accordingly no compensation could be ordered.

At the BC Court of Appeal, the justices ruled that a decree of possession was required, and such a decree was impossible. They stated that section 88 of the *Indian Act* applied only to Indians and does not reference or incorporate lands reserved for Indians. The Court of Appeal also held that compensation in lieu of division of assets could be ordered and remanded the matter for the trial judge’s determination.

The Supreme Court of Canada held that provincial legislation is inapplicable to Indian reserve land, which is under federal exclusive jurisdiction. It also held that section 88 does not apply to lands reserved for Indians, and therefore the property provisions of the *Family Relations Act* do not apply on reserve. The Supreme Court agreed with the BC Court of Appeal that although the reserve lands could not be divided, the trial court could order compensation<sup>7</sup> in lieu of division of assets pursuant to section 52 (2) (c) of the *Family Relations Act*. The appeal was dismissed.

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<sup>7</sup> There may be existing case law on how compensation in lieu of division of a matrimonial home on reserve is to be determined, but the writer is not aware of any such cases. One can imagine that further guidance on the valuation of matrimonial homes on reserve will come from the proposed Bill C-47, *Family Homes on Reserves and Matrimonial Interests or Rights Act* found at [http://www.ainc-inac.gc.ca/wige/mrp/fam\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/fam_e.html) (accessed April 23, 2008). Specifically, ss. 33 to 38 deal with valuation of property, including factors such as one half of the value of home appreciation, the valuation date, the amount of debt or liability, the amount that a spouse contributed to any improvements, and market value of similar structures on reserve. This summary simplifies the Act, which is complex in how it values all of these factors, including a difference in Aboriginal and non-Aboriginal members. Determining the valuation date is complicated and can depend on when the couple separates or divorces or when the matter was brought to court or when the judgment was issued.

*Paul v. Paul*<sup>8</sup>

Pauline and Edward Paul, both members of Tsartlip Indian Band in BC, had separated. The Pauline Paul was awarded interim possession of the matrimonial home situated on reserve land pursuant to section 77 of the *Family Relations Act*. Edward Paul had a certificate of possession for the matrimonial home pursuant to section 20 of the *Indian Act*. The issue was whether section 77 of the *Family Relations Act* applies to matrimonial homes on reserve lands.

The trial judge granted an order that Pauline Paul have interim possession of the family home. The BC Court of Appeal overturned the trial judge's decision on the basis that this case is indistinguishable from the *Derrickson* case.

The Supreme Court of Canada held that section 77 of the *Family Relations Act* was in conflict with the *Indian Act* and therefore does not apply to family homes on reserve lands. The appeal was dismissed.

These two cases remain the predominant case law regarding matrimonial property on reserve, and therefore they reflect the law until the *Indian Act* is amended or new legislation is introduced or treaty agreements are concluded.

## 2. Impact on Aboriginal communities

### a. Pre-contact status of Aboriginal societies

Since time immemorial, Aboriginal peoples have governed North America. Many Aboriginal societies were matrilineal, meaning they followed the mother's line. Aboriginal societies that were matrilineal included the Iroquois, Tuscarora,<sup>9</sup> Hurons, Seneca, Cayuga, Onondaga, Oneida, Mohawks, Kwakiutl, and Tsimshian.<sup>10</sup> As well, the

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<sup>8</sup> [1986] 1 S.C.R. 306.

<sup>9</sup> Joy Bilharz, "First Among Equals? The Changing Status of Seneca Women," in Laura F. Klein and Lillian Ackerman, eds., *Women and Power in Native North America* (Norman: University of Oklahoma Press, 1995) 101 at 101.

<sup>10</sup> Sharon D. McIvor, "Aboriginal Self-Governance: The Civil and Political Rights of Women" (master's in law thesis, Queen's University, 1995) at 20.

Native Women's Association of Canada includes Inuit and Cree among the indigenous matriarchies.<sup>11</sup>

Generally, in these societies names and titles would be passed through the mother, and after marriage the man would move to the woman's family location. In matrilineal communities, women were often active in governance in a variety of ways, but did not have more power than men. For example, Iroquois matriarchy<sup>12</sup> was based on the concepts of equality, caring, and respect.<sup>13</sup>

However, indigenous matrilineal societies were by no means universal. Some pre-contact societies were patrilineal or patriarchal, like the Blackfoot and Great Lakes peoples.<sup>14</sup> Patrilineal societies follow the father's line when it comes to, for example, property, titles, names and kinship ties, but they sustain recognition and affection for the matrilineal relatives. Patriarchal societies involve the fathers having primary responsibility for the family and community. An example of a patriarchal society in Canada today is the Ojibway peoples.

### Gender roles

In pre-contact times, Aboriginal women held unique and influential positions in their society, perhaps because of their reproductive roles. They governed, controlled leadership, owned all community property, and had dispute resolution authority.<sup>15</sup>

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<sup>11</sup> Native Women's Association of Canada, "Matriarchy and the Canadian Charter: A Discussion Paper" <http://www.nwac-hq.org/en/documents/MatriarchyandtheCanadianCharter.pdf> (accessed April 23, 2008), at 3. However, it is important to note that very few authors would include the Inuit as a matriarchy and many insist that many Inuit peoples are patriarchal.

<sup>12</sup> Note that many academics discredit the notion of a true matriarchy existing, as a matriarchy would involve women in leadership roles and offer them main control over property and economy.

<sup>13</sup> Thomas Isaac and Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten? Aboriginal Women and the Inherent Right of Self-Government" (1992) 21(3) *Manitoba Law Journal* 453 at 454.

<sup>14</sup> Bethany R. Berger, "After Pocahontas: Indian Women and the Law, 1830-1934" (1997) 21(1) *American Indian Law Review* 1 at 18.

<sup>15</sup> Patricia Monture-Angus, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 241.

There are many reports describing Aboriginal women as being “central to the spirituality and existence of the nation.”<sup>16</sup> Cree elders taught that “Cree women are at the Centre of the Circle of Life.”<sup>17</sup> They “were never viewed as naturally inferior.”<sup>18</sup> Within the Mi’kmaq Federation, women and men were equal in status.<sup>19</sup> Mohawk female elders and grandmothers held special positions of power as life-givers coming full circle. Grandmothers were the only ones who had “almost walked a full circle,”<sup>20</sup> and, accordingly, they had the wisdom and power to be solely responsible for the discipline of all community members. In Sioux society, women were considered to be sacred.<sup>21</sup>

Some scholars have written that Aboriginal women were never equal to Aboriginal men and have never sought equality, because every Aboriginal woman holds a special position at the centre of the Circle of Life and as a keeper of the culture.<sup>22</sup> For some, the European notion of equality lowers the position of Aboriginal women and is a selfish, individualist, and alienating concept.<sup>23</sup> They contend that equality is not the starting point.<sup>24</sup>

It is important to note that pre-contact status of Aboriginal men was never inferior, and always similar, equivalent, or complementary to Aboriginal women. Prior to contact, Aboriginal men were respected, and some of the teachings were that they were sacred and had a special duty to take care of women and to never disrespect women. Aboriginal men were not considered “better” than women; rather, there was recognition of the different roles that each gender played in the community and the balance that each gender provided to society.

### b. Traditional property rights

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<sup>16</sup> McIvor, *supra* note 10, at 10.

<sup>17</sup> Mary Ellen Turpel-Lafond, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6 *Canadian Journal of Women and the Law* 174 at 180.

<sup>18</sup> *Ibid.* at 185.

<sup>19</sup> McIvor, *supra* note 10, at 15.

<sup>20</sup> Monture-Angus, *supra* note 15, at 242.

<sup>21</sup> Gloria Valencia-Weber and Christine P. Zuni, “Domestic Violence and Tribal Protection of Indigenous Women in the United States” (1995) 69 *St. John’s Law Review* 69 at 70.

<sup>22</sup> Turpel-Lafond, *supra* note 17 at 179-181.

<sup>23</sup> *Id.*

<sup>24</sup> *Ibid.* at 179-180.

"In many tribes, women owned the property. In many groups genealogy and inheritance were traced on the mother's side."<sup>25</sup> For example, in Iroquois societies, women held the property and hereditary titles and had great economic, political, and legal power enshrined in the Iroquois constitution.<sup>26</sup> They had control over crops and over nominations of chiefs.<sup>27</sup>

Property rights were just a part of the huge economic power that Aboriginal women controlled, which included the responsibility of providing for others. Providing food and labour for their people was not a burden to Aboriginal women; in fact, for many it meant freedom, independence, autonomy, and economic security.<sup>28</sup>

It is important to note that the property rights of pre-contact Aboriginal societies generally differed from European notions of private property rights. Europeans considered real property in terms of "fee simple title," giving absolute land ownership rights to the individual. In contrast, many Aboriginal societies viewed land as a communal right: "The members of a tribe have an undivided interest in the land; everybody, as a whole, owns the whole. Furthermore, the land belongs not only to people presently living, but also to past generations and future generations..."<sup>29</sup> This is inherent in the concept of Aboriginal title. Chief John Snow, in explaining the different points of view between the Europeans and the Stoney Indians, explains that the Rocky Mountains were sacred to his people.<sup>30</sup>

### c. Traditional divorces

The little research that exists concerning the ending of relationships prior to contact suggests that in many Aboriginal societies, "divorces were easily obtained and

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<sup>25</sup> Mavis A. Erickson, *Where Are the Women? Report of the Special Representative on the Protection of First Nation Women's Rights* (Ottawa: Indian and Northern Affairs, 2001) at 1.

<sup>26</sup> Native Women's Association of Canada, *supra* note 13, at 2-3.

<sup>27</sup> Bilharz, *supra* note 9, at 102.

<sup>28</sup> Berger, *supra* note 14, at 17.

<sup>29</sup> Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm' " in J. Rick Pointing, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) at 244-247.

<sup>30</sup> Chief John Snow, *These Mountains Are Our Sacred Places: The Story of the Stoney Indians* (Toronto: Samuel Stevens, 1977).

executed: a woman would place his belongings at the door or ask him to leave."<sup>31</sup> For the Inuit:

Arctic divorce may be a better measure of equality than marriage. Both women and men can institute divorce simply by packing up and leaving, provided they have somewhere to go. Divorce for a woman, particularly one with small children, is more problematic than for a man because first she must find another household willing to take her in. The usual choice is to seek temporary shelter with a close relative until such time as another suitable consort is found....<sup>32</sup>

Upon separation, Iroquois women had all the property rights and would take the children.<sup>33</sup> Traditionally then, it appears that divorces were easily obtained and Aboriginal women enjoyed a degree of control over property rights.

#### **d. Imposition of European values on Aboriginal property rights**

Historically, there are many accounts of the deprivation of property rights, as the following quotes indicate:

- It was the "European concepts of individual property ownership that disrupted the matriarchal system and social organization."<sup>34</sup>
- "The impact of federal legislation was to turn the Indian world upside down and inside out. Matriarchies became instant patriarchies where men held all civil, political and property rights and women had no rights."<sup>35</sup>
- "Iroquois society went from matriarchy to patriarchy with the introduction of Handsome Lake Code, which was forced on them by colonists."<sup>36</sup>
- "The missionaries were among the first to impose patriarchal policies on native people. For example, in central British Columbia, Father Adrian Morice banned, among other things, the practice of matrilineal inheritance in 1868 [Hudson 1977:87]. The Yinka Dene people must now pass down their property on the father's side for the first time since time immemorial. It is important to note the resistance to many of these new policies. Father Coccola, who worked in the same

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<sup>31</sup> McIvor, *supra* note 10, at 33.

<sup>32</sup> Lee Guemple, "Gender in Inuit Society" in Klein and Ackerman, eds., *supra* note 11, at 24.

<sup>33</sup> Monture-Angus, *supra* note 15, at 235.

<sup>34</sup> Native Women's Association of Canada, *supra* note 13, at 5.

<sup>35</sup> McIvor, *supra* note 10, at 33.

<sup>36</sup> *Ibid.* at 19.

region in the early twentieth century, lamented in 1912 that the people were still transferring traditional territories on their mother's side [Hudson 127]."<sup>37</sup>

- "In 1876, no women in Canada were allowed to own property, and so native women under the *Indian Act* were no exception. Later, in 1884 the Act was amended to permit any Indian male to bequeath property to anyone, including his wife; however the wife must be of "good moral character" as defined by federal authorities [RCAP v 1:301]. Thus, under the encouragement of the missionaries and the Act, most property was inherited on the father's side."<sup>38</sup>

In summary, prior to European contact, the traditional status of Aboriginal women in many societies granted her property rights, privileges, and responsibilities, and divorces were traditionally easily obtainable. Aboriginal men were considered different from Aboriginal women but not superior or inferior. Aboriginal men and women worked in harmony to support each other.

Pre-contact Aboriginal societies differed and clashed with European concepts of property in many fundamental ways. Colonization has effectively reversed the positions of Aboriginal women; they now have no property rights and no family support or housing. Aboriginal women may now find themselves having to seek basic provisions such as food and housing after a marriage ends. Colonization has affected every aspect of life on the reserve, including when a family relationship ends.

#### e. Current impacts on Aboriginal communities

The lack of matrimonial property legislation has had a greater impact on Aboriginal women than Aboriginal men due to historical discrimination. In the report *Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime*, it was found that while the majority of interviewees held various forms of property while in a relationship with their former spouses (73%),<sup>39</sup> including a joint certificate of possession for the property (76%),<sup>40</sup> most of the women said they received no compensation or division of matrimonial property from their former

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<sup>37</sup> Erickson, *supra* note 25, at 3.

<sup>38</sup> *Ibid.* at 5.

<sup>39</sup> Karen Abbott, *Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime* (Ottawa: Indian and Northern Affairs Canada, 2003) [http://www.ainc-inac.gc.ca/wige/ura/index\\_e.html](http://www.ainc-inac.gc.ca/wige/ura/index_e.html) (accessed April 23, 2008) at 28.

<sup>40</sup> *Ibid.* at 29.

spouses after the relationship ended (90%).<sup>41</sup> This report also found that only three respondents, or 10%, were involved in some form of matrimonial property division. One was a widower, another was a wife and husband who had agreed that the house would go to their son when he reached the age of majority, and another was a couple who agreed to a 50/50 split.<sup>42</sup>

Intertwined with the lack of matrimonial real property regime on reserve are the issues of domestic violence, housing shortages, poverty, unfair and discriminatory housing policies, lack of information, band membership, and lack of social and health services.<sup>43</sup> For example:

- "...women at the focus group noted that aboriginal women and their children rather than aboriginal men are usually forced to vacate the matrimonial home upon marital breakdown, particularly where family violence is an issue [Edmonton August 15, 2000; Vancouver August 18, 2000; Prince George, August 20, 2000]."<sup>44</sup>
- "Upon separating from his wife, a man sold all of the matrimonial property, including the matrimonial home, which was situated on reserve land. Consequently, the woman received nothing when their divorce was finalized. The woman was unaware of her rights and did not know that she could seek interim relief to protect the assets. Nevertheless, the court arguably would not have been able to order interim relief in respect of the matrimonial home [Edmonton, August 15, 2000]."<sup>45</sup>
- "One woman reported that where a couple divorces, it is the policy of her band to buy out the woman's interest in the home and require the woman to leave the matrimonial home [Vancouver, August 18, 2000]. The following examples underscore the need for greater protection of the interests of aboriginal women. A status Indian woman married a man from another band. Her husband's band refused to admit her as a member of his band. Consequently, the matrimonial home was allotted to the husband. Upon the breakdown of marriage, the woman was forced to leave the matrimonial home with her children. Since leaving the matrimonial home she has lived at Edmonton, Red Deer and Rocky Mountain House in search of employment and affordable housing. Another woman was married to

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<sup>41</sup> *Ibid.* at 38.

<sup>42</sup> *Ibid.* at 38.

<sup>43</sup> Standing Senate Committee on Human Rights, *A Hard Bed to Lie In: Matrimonial Real Property on Reserve* (Ottawa: Queen's Printer, 2003) <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf> (accessed April 23, 2008) (hereafter cited as "*A Hard Bed*").

<sup>44</sup> Erickson, *supra* note 25, at 39.

<sup>45</sup> *Id.*

the Chief of her band. Upon a breakdown of the marriage, she was forced to leave the matrimonial home and for obvious reasons the band council did not offer the woman any assistance in connection with protecting her interests [Rocky Mountain House, August 16, 2000].”<sup>46</sup>

These examples clearly show that Aboriginal women are excluded from decision making, and often family status and family networks also play a pivotal role in the division of matrimonial property.

In summary, Aboriginal women have been more negatively affected than Aboriginal men because of the history of colonization. One negative impact is that there is often no choice to stay on reserve when a marriage ends due to the housing shortages. Aboriginal men have also been affected by the lack of matrimonial property laws on reserve, but there is little or no research or articles on the male perspective or impacts. Certainly the children of divorce, both male and female, are being negatively affected by being removed from the cultural surroundings of a reserve. There have been few studies on the impact of the community as a whole due to the lack of matrimonial property laws. One can only surmise that the ending of a marriage and potential removal of one spouse and children can only further isolate the reserve and contribute to more community disintegration and loss of traditional values. Aboriginals who are forced off reserve after a marriage relationship ends may find themselves entering crowded expensive urban areas with poor housing conditions and no community support.

#### **f. Current work on matrimonial property on reserve**

There are many organizations critically examining the problems associated with matrimonial property on reserve. On June 20, 2006, then Minister of Indian Affairs Jim Prentice announced a nationwide initiative on matrimonial property on reserve. This announcement was made with the Native Women’s Association of Canada and the Assembly of First Nations. Since that announcement was made, many organizations have responded:

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<sup>46</sup> *Id.*

- The Assembly of First Nations, Native Women's Association of Canada, Congress of Aboriginal Peoples, Indigenous Bar Association, National Association of Friendship Centres, National Aboriginal Circle Against Family Violence, Femmes Autochtones du Québec, Native Council of Nova Scotia, Federation of Newfoundland Indians, New Brunswick Aboriginal People's Council, and Native Council of PEI held six national sessions and 46 regional sessions regarding matrimonial property.<sup>47</sup>
- The Assembly of First Nations held regional dialogue sessions in each province and territory from November 2006 to January 2007. They also recently released two publications: *Reconciling First Nations and Crown Jurisdiction over Matrimonial Real Property on Reserves and Addressing Immediate Needs of First Nations Families* (February 2007) and *First Nations Matrimonial Property Law Resource Handbook* (July 2007).<sup>48</sup>
- The Native Women's Association of Canada has conducted their own consultations and, in January 2007, released a paper, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper*.<sup>49</sup>
- The National Association of Friendship Centres has posted their December 5, 2006 *Report on the Matrimonial Property Consultation* on their website.<sup>50</sup> Their report details the support for First Nations jurisdiction over matrimonial property laws, the call for minimum standards, and the concern for implementation, enforcement, and formal relationships.
- The Chiefs of Ontario adopted a historic traditional law concerning matrimonial real property on March 23, 2007, after extensive engagement and consultation with their citizens.<sup>51</sup>
- The National Aboriginal Circle Against Family Violence released a document concerning their own consultation with domestic violence shelters, entitled

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<sup>47</sup> According to the *Consultation Report on Matrimonial Real Property* (Ottawa: Indian and Northern Affairs, March 7, 2007) available at [http://www.nwac-hq.org/en/documents/CR\\_English.pdf](http://www.nwac-hq.org/en/documents/CR_English.pdf) (accessed April 23, 2008).

<sup>48</sup> Assembly of First Nations, *Reconciling First Nations and Crown Jurisdiction Over Matrimonial Real Property on Reserves and Addressing Immediate Needs of First Nations Families* (Ottawa: February 2007) <http://www.afn.ca/misc/MRP-Reconciling.pdf> (accessed April 23, 2008) and *First Nations Matrimonial Property Law Resource Handbook* (Ottawa: Assembly of First Nations, July 2007) [http://www.afn.ca/cmslib/general/07-06-25%20Model%20Law%20Research%20Handbook\\_eng.pdf](http://www.afn.ca/cmslib/general/07-06-25%20Model%20Law%20Research%20Handbook_eng.pdf) (accessed April 23, 2008).

<sup>49</sup> Native Women's Association of Canada, *Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper* (Ohsweken, ON: January 2007) <http://www.nwac-hq.org/en/documents/NWACMRP.pdf> (accessed April 23, 2008).

<sup>50</sup> Lynn Chabot and Lise Chabot, *Report on the Matrimonial Real Property Consultation* (Ottawa: National Association of Friendship Centres, December 6, 2006) <http://www.nafc-aboriginal.com/policy/NAFC%20MRP%20En.pdf> (accessed April 23, 2008).

<sup>51</sup> Chiefs of Ontario Backgrounder for All First Nations: Indian Affairs Initiative on Matrimonial Real Property On-Reserve (Toronto, March 2007) [http://www.chiefs-of-ontario.org/news/docs/Indian\\_Affairs\\_initiative\\_MRP.doc](http://www.chiefs-of-ontario.org/news/docs/Indian_Affairs_initiative_MRP.doc) (accessed April 23, 2008).

*Responses from Aboriginal Women in Seven INAC-Funded Shelters Regarding Matrimonial Real Property November 5-December 14, 2006.*<sup>52</sup>

- The Indigenous Bar Association released their consultation called *Matrimonial Real Property Consultation*.<sup>53</sup>
- The Ontario Native Women's Association issued their own *Matrimonial Property Consultation Report*.<sup>54</sup>

At the June 20, 2006 government announcement, the Minister appointed Wendy Grant-John, an Aboriginal leader, as his special representative on this issue. The terms of her appointment involved acting as a neutral party to assist the Assembly of First Nations and Native Women's Association of Canada in exploring options to address the issues of matrimonial property on reserve. The *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserve* was released on March 9, 2007.<sup>55</sup> This report indicates that there were several key themes throughout the consultations: access to justice, fundamental human rights, housing, importance of traditional values, well-being of children, membership issues, protection of First Nations lands, respect for Aboriginal and treaty rights, agreements and First Nations laws, community development of solutions, resources and capacity to implement solutions, violence and women's voices. As well, the report describes the numerous concerns about the adequacy of the consultation process itself. It stresses that there is an urgent need to address dispute resolution and administration of justice immediately.

Throughout the report, it seems clear that unilateral national or provincial legislation is undesirable and that the solution would include legislation or other legal solutions

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<sup>52</sup> National Aboriginal Circle Against Family Violence, *Responses from Aboriginal Women in Seven INAC-Funded Shelters Regarding Matrimonial Real Property, November 5-December 14, 2006* (Ottawa: 2007) [http://www.nacafv.ca/en/pdf/2007/nacfv\\_en.pdf](http://www.nacafv.ca/en/pdf/2007/nacfv_en.pdf) (accessed April 23, 2008).

<sup>53</sup> Indigenous Bar Association Final Conference Report Addendum to the Matrimonial Real Property On-Reserve Meeting with Indian and Northern Affairs Canada held in Saskatoon, SK, on October 21, 2006 <http://www.indigenousbar.ca/pdf/INAC%20report%20addendum.pdf> (accessed April 23, 2008).

<sup>54</sup> Ontario Native Women's Association, *Matrimonial Property Consultation Report* (Thunder Bay, ON: December 2006) <http://onwa-tbay.ca/PDF%20Files/Forms/Matrimonial%20Real%20Properties%20Report.pdf> (accessed April 23, 2008).

<sup>55</sup> Wendy Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserves* (Ottawa: Women's Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development, 2007), [http://www.ainc-inac.gc.ca/wige/rmr/index\\_e.html](http://www.ainc-inac.gc.ca/wige/rmr/index_e.html) (accessed April 22, 2008).

that would be innovative, inclusive, holistic, respectful, and flexible to address the complex and unique nature of the matrimonial real property regime on reserve. The report is comprehensive and thorough in its analysis of the comments and solutions put forward in the consultation process.

A recent release from the Standing Senate Committee on Human Rights (June 13, 2007) called on the government to make matrimonial property rights on reserve a priority and to introduce new legislation in the fall of 2007. As well, on March 4, 2008, the Government of Canada introduced a new bill, *The Family Homes on Reserve and Matrimonial Interests or Rights Act*, which is discussed below.

### 3. Future directions

There are several proposed solutions to end the matrimonial property legislative gap on reserve. These include creating new federal legislation, amending the *Indian Act*, applying provincial laws on reserve, and recognizing the inherent right of First Nations self-government. With any of these options, or even with a blended approach, there remain outstanding issues and concerns.

#### a. Create a new federal law—*The Family Homes on Reserve and Matrimonial Interests or Rights Act*<sup>56</sup>

This proposed legislation is intended to ensure that matrimonial property rights and remedies are available to all residents on reserve. Section 7 provides a mechanism for First Nations to develop their own property laws. However, any First Nations laws must be first verified and then undergo community approval and certification to come into force (sections 8-16). Any First Nations with reserve lands, lands under the First Nations Land Management Act, or self-governments lands without the First Nations matrimonial property laws as prescribed under section 7 will be defaulted to the federal legislation regarding matrimonial property on reserve.

The proposed legislation has provisions to deal with occupation, emergency protection orders, orders of exclusive possession, division of the value of matrimonial property,

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<sup>56</sup> *The Family Homes on Reserve and Matrimonial Interests or Rights Act*, Bill C-47, *supra* note 7.

death of a spouse, and other terms regarding domestic violence, leases, and notices to First Nations council. It allows for provincial judges and justices of the peace to hear applications and, when hearing a divorce matter or other family proceedings concerning the end of the relationship (typically child custody and child support) to also hear the division of a matrimonial home on reserve.

There is significant opposition to this bill:

- The Native Women's Association of Canada argue that the bill does not promote indigenous legal systems or address issues such as violence, poverty, housing shortages or the imbalance of power with respect to " *Indian Act* Chiefs and Council." <sup>57</sup>
- Some critics assert that on-reserve residents will not have access to the courts sufficient to enforce their rights and that there will be considerable difficulty in assessing "market value" of houses on reserve, which are generally band-owned assets. <sup>58</sup> Also problematic is that the proposed legislation will protect the rights of non-Aboriginal spouses to remain on the reserve upon dissolution of marriage or death of a spouse. Further, the bill does not address the issue of self-government, as many Aboriginal leaders have been demanding.
- The Quebec Native Women do not support the bill because of the short consultation period and the lack of consideration of basic cultural values and laws of Aboriginal people. <sup>59</sup> (In response, the Government of Canada insists that the consultation process has been thorough with preliminary consultations having started in October 2005. <sup>60</sup>) They also state that the bill fails to address gender discrimination, housing shortages, and high levels of domestic violence on reserve. <sup>61</sup> Further, they assert that a pan-Aboriginal approach that minimizes the diversity of Aboriginal peoples in Canada will not work, that Aboriginal women on reserve do not share the same realities of non-Aboriginal women off reserve, and that solutions for them may not work on reserve. <sup>62</sup>

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<sup>57</sup> Native Women's Association of Canada, " 'Consultative Partnership' a Sham," March 4, 2008, at <http://www.nwac-hq.org/en/documents/PressReleasereMRPlegislationMar4-08.pdf> (accessed April 23, 2008).

<sup>58</sup> "More rights on reserves," *Winnipeg Free Press* editorial, March 7, 2008 (accessed April 23, 2008).

<sup>59</sup> See the News page on the Quebec Native Women's website at [http://www.faq-qnw.org/documents/C47-openletter-19-03-08\\_000.pdf](http://www.faq-qnw.org/documents/C47-openletter-19-03-08_000.pdf) (accessed April 23, 2008).

<sup>60</sup> On-Reserve Matrimonial Real Property History of Developments page on the Indian and Northern Affairs Canada website at [http://www.ainc-inac.gc.ca/wige/mrp/ipn1\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/ipn1_e.html) (accessed April 23, 2008).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Rather than try to fix a “fundamentally flawed system,” many advocates have stated that it is important to start fresh. This bill is not yet law and will not come into effect until it has successfully passed three readings and approval of both the House of Commons and Senate of Canada.

### **b. Amend the federal *Indian Act***

Many organizations have requested that the *Indian Act* be amended:

- The Aboriginal Justice Inquiry of Manitoba (1991) recommended that the *Indian Act* be amended to address matrimonial property issues on reserve.
- The Joint Ministerial Advisory Committee released their Final Report on March 8, 2002: *Recommendations and Legislative Options to the Honourable Robert Nault, PC, MP, Minister of Indian Affairs and Northern Development on the First Nations Governance Initiative*.<sup>63</sup> They recommended that matrimonial property rights on reserve be a key priority for future reform.<sup>64</sup>
- The Standing Senate Committee on Human Rights issued a report in November 2003: *A Hard Bed To Lie In: Matrimonial Real Property On Reserve*.<sup>65</sup> They recommended that the *Indian Act* immediately be amended so that provincial matrimonial property laws can apply on reserve; everyone who lost their status prior to 1985 be able to regain their status, including women, children, and grandchildren and lost status through marriage; and both spouses be recognized as having a right of occupancy regardless of whose name is on the certificate of possession.

### **c. Apply provincial legislation on reserve**

In June 2005, the Standing Committee on Aboriginal Affairs and Northern Development issued a report entitled *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*.<sup>66</sup> They recommended that the government immediately

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<sup>63</sup> Joint Ministerial Advisory Committee, *Recommendations and Legislative Options to the Honourable Robert Nault, PC, MP, Minister of Indian Affairs and Northern Development Final Report on the First Nations Governance Initiative* (Ottawa: Queen's Printer, 2002) [http://www.ainc-inac.gc.ca/ps/lts/fng/prev/JMACFR\\_M802\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/fng/prev/JMACFR_M802_e.html) (accessed April 23, 2008).

<sup>64</sup> *Ibid.* at 7.

<sup>65</sup> *A Hard Bed*, *supra* note 43.

<sup>66</sup> Standing Committee on Aboriginal Affairs and Northern Development, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property* (Ottawa: Communication Canada Publishing, 2005) <http://cmte.parl.gc.ca/Content/HOC/committee/381/aano/reports/rp1906551/aanorp05/aanorp05-e.pdf> (accessed April 23, 2008) (hereafter cited as “*Walking Arm-in-Arm*”).

consult with the Native Women's Association of Canada and the Assembly of First Nations to draft interim stand-alone legislation or amendments to the *Indian Act* to make provincial/territorial matrimonial property laws apply to real property on reserve lands.<sup>67</sup> The *Indian Act* does not address First Nations matrimonial property laws that are approved by the First Nations community but not recognized by the Department of Indian and Northern Affairs, such as the Ojibways of Sucker Creek Matrimonial Property Laws.<sup>68</sup>

Many others have advocated that the government repeal or amend section 67 of the Canadian Human Rights Act in consultation with Aboriginal communities and organizations. In effect, this would allow the provincial family legislation to apply on reserve. The recommendation is for this be done to protect on-reserve First Nations individuals from discrimination under the *Indian Act* and to insert an interpretive clause requiring a balance between individual and community interests.<sup>69</sup> However, many Aboriginal communities are opposed to provincial encroachment on their sovereign and self-government affairs and are therefore opposed to this option.

#### **d. Recognize inherent rights of self-government**

There are many ways in which First Nations self-government powers may be exercised including, for example, *the First Nations Land Management Act*, self-government agreements and treaties, and band housing policies and bylaws.

The Assembly of First Nations is calling for an immediate reconciliation process that would recognize and implement First Nations jurisdiction as a solution for matrimonial property on reserve.<sup>70</sup> The recent Assembly of First Nations publication *First Nations Matrimonial Property Law Resource Handbook*<sup>71</sup> is a good resource for any First

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<sup>67</sup> *Id.*

<sup>68</sup> See First Nations Law-making Activity on the Matrimonial Real Property and Self-Government Agreements page at [http://www.ainc-inac.gc.ca/wige/mrp/fni\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/fni_e.html) (accessed April 23, 2008).

<sup>69</sup> *Id.*

<sup>70</sup> Assembly of First Nations, *Reconciling First Nations and Crown Jurisdiction over Matrimonial Real Property on Reserves and Addressing Immediate Needs of First Nations Families*, *supra* note 50.

<sup>71</sup> Assembly of First Nations, *First Nations Matrimonial Property Law Resource Handbook*, *supra* note 50.

Nations wanting to proceed with its own matrimonial property laws. These might be the most respectful options as they recognize that the solutions to the problems of dealing with matrimonial property on reserves lie in the communities themselves.

**First Nations Land Management Act, S.C. 1999, c. 24 (“FNLMA”)<sup>72</sup>**

The First Nations Land Management Act (“FNLMA”) is a federal law that was enacted in June 1999. The main purpose of the FNLMA is to recognize First Nations powers to make laws regarding reserve lands. Once a First Nation signs the FNLMA Framework Agreement, the provisions of the *Indian Act* no longer apply to their reserve lands. First Nations can create their own system of land allotment. The FNLMA Framework Agreement requires that the First Nation enact its own rules and regulations in cases involving a breakdown of marriage for the use, occupation, and interest in reserve lands. The FNLMA is one tool for First Nations to address the matrimonial property issue, but only a few First Nations in Canada have signed onto the FNLMA (approximately 20 as of October of 2007).<sup>73</sup>

About half of the FNLMA First Nations have created their own matrimonial real property laws.<sup>74</sup> One is the Westbank First Nation, which passed its own family property law on February 20, 2006, pursuant to the Westbank Self-Government Agreement.<sup>75</sup> Westbank’s matrimonial property laws include mandatory mediation of which the cost is equally shared by the spouses. This may be prohibitive for some Aboriginal women as they might not be able to bear the costs. There is also literature to show that divorcing women are at a disadvantage if the divorce proceeds though mediation. On the positive side, the custodial parent receives priority in the matrimonial home, which will benefit the children.

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<sup>72</sup> *Supra* note 4.

<sup>73</sup> See the *First Nations Land Management Act* page on the Indian and Northern Affairs Canada website at [www.ainc-inac.gc.ca/wige/mrp/ipn8\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/ipn8_e.html) (accessed April 23, 2008).

<sup>74</sup> See the Matrimonial Property Land Laws page on the First Nations Land Advisory Board website at <http://www.fafnlm.com/content/en/LandLaws.html> (accessed April 22, 2008).

<sup>75</sup> Westbank First Nation, Law No. 2006-02: Family Property Law (Westbank, BC: February 20, 2006) [http://wfn.ca/pdf/feb202006\\_2\\_.pdf](http://wfn.ca/pdf/feb202006_2_.pdf) (accessed April 23, 2008).

### Self-government agreements and treaties

A very important way in which Aboriginal sovereignty is realized is through self-government agreements or treaties. *A Hard Bed to Lie In: Matrimonial Real Property On Reserve* recommends that any self-government agreement or treaty expressly address the issue of matrimonial property.<sup>76</sup> Recently there has been the *Nisga'a Final Agreement*,<sup>77</sup> which stipulates that if the Nisga'a fail to enact their own matrimonial property laws, the BC provincial family laws will govern Nisga'a lands by default. However, there are no guidelines set and each First Nation member is dependent on its leadership to bring forward and enact provisions guaranteeing fairness for both genders and all members.

### Band housing policies, codes, and bylaws

Another opportunity for self-governance exists through the existing band housing policies and bylaws. The Royal Commission on Aboriginal Peoples (1996) concluded that all First Nations have inherent jurisdiction over marriage and matrimonial property. An example of housing policy that deals with matrimonial property issues can be viewed on line at the Squamish Nation Network.<sup>78</sup>

*A Hard Bed to Lie In: Matrimonial Real Property On Reserve* recommends that any changes take into consideration that some First Nations already have their own measures in place and they should be able to follow their own rules so long as they afford some protection at least equivalent to provincial legislation.<sup>79</sup> Many others support existing band jurisdiction: "That the federal government amend the *Indian Act* to provide band councils with authority to enact bylaws relating to interim protection of assets on a reserve in the event of a separation or marital breakdown. That 51% of the electorate be required to participate in a vote to approve the bylaw before it can be given effect [Edmonton, August 15, 2000]."<sup>80</sup>

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<sup>76</sup> *A Hard Bed*, *supra* note 43.

<sup>77</sup> *Nisga'a Final Agreement*, 1999, [http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html) (accessed April 23, 2008).

<sup>78</sup> Squamish Nation Housing Policy, Approved October 10, 2001, and revised effective April 1, 2006, <http://www.squamish.net/files/PDF/HousingPolicy06.pdf> (accessed April 23, 2008).

<sup>79</sup> *A Hard Bed*, *supra* note 43.

<sup>80</sup> Erickson, *supra* note 25 at 39.

*Walking Arm-In-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property* recommends that the government commit to providing recognized national and provincial/territorial First Nations organizations with the human and financial resources required to enable them to assist members to develop their own matrimonial real property codes.<sup>81</sup> Although the federal government has failed to recognize the authority of several instances of First Nations matrimonial property legislation, the key question for Aboriginal activists is whether federal permission is really required for a domestic matter of a sovereign nation.

#### e. Dispute resolution mechanism

Regardless of any new legislation, there will be an ongoing need to resolve disputes between a separating couple, and preferably a method will be used that has Aboriginal design and involvement in mind. It has been recommended:

that the federal government establish independent tribunals for each reserve to make and enforce orders for interim possession of matrimonial real property in the event of marriage breakdown, the disposition of matrimonial property in the event of a divorce, custody matters, child support and family violence matters. If the federal government enacts legislation to govern the division of matrimonial real property on reserves in the event of marital breakdown, the tribunal could enforce the provisions of the legislation [Toronto, September 13, 2000, Prince Albert, September 23, 2000; Winnipeg, September 29, 2000; The Pas, September 30, 2000].<sup>82</sup>

There are numerous ways in which matrimonial property division could occur. Possible processes or mechanisms include:

- Aboriginal dispute resolution
- First Nations tribunals or other institutions
- Provincial courts or Aboriginal courts
- Alternative dispute resolution such as mediation or negotiation
- An Aboriginal ombudsperson office
- Arbitration or other binding mechanisms

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<sup>81</sup> *Walking Arm-in-Arm*, *supra* note 56.

<sup>82</sup> Erickson, *supra* note 25 at 40.

An excellent review of the dispute resolution options is provided in J.E.C. Greene's report, *Towards Resolving the Division of On-reserve Matrimonial Real Property Following Relationship Breakdown: A Review of Tribunal, Ombuds and Alternative Dispute Resolution Mechanisms*.<sup>83</sup>

#### 4. Further considerations

There are many issues yet to be resolved in creating positive and meaningful change for Aboriginal women, men, and children on reserve. A short list, although not exhaustive, includes domestic violence, children, and a land registry.

##### a. Domestic violence

A common cause of the dissolution of relationships is domestic violence, which is intertwined with the issue of matrimonial property division: "One woman noted that some bands have enacted policies that require the immediate removal of the violent spouse where there is an incidence of family violence [Prince Albert, September 23, 2000]."<sup>84</sup>

In the report, *Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime*, the predominant recommendation from Aboriginal participants is that there be more domestic violence intervention and prevention, including more domestic violence shelters on reserve.<sup>85</sup>

##### b. Children as a first priority

One positive note is that there has been consensus in many of the reports regarding child custody and priority. *A Hard Bed to Lie In: Matrimonial Real Property On Reserve* recommends that any changes take into consideration the rights of children, including

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<sup>83</sup> Jo-Ann E.C. Greene, *Towards Resolving the Division of On-reserve Matrimonial Real Property following Relationship Breakdown: A Review of Tribunal, Ombuds and Alternative Dispute Resolution Mechanisms* (Ottawa: Indian and Northern Affairs Canada Women's Issues and Gender Equality Directorate, May 2003) [http://www.ainc-inac.gc.ca/wige/trd/index\\_e.html](http://www.ainc-inac.gc.ca/wige/trd/index_e.html) (accessed April 23, 2008).

<sup>84</sup> Erickson, *supra* note 25 at 39.

<sup>85</sup> Abbott, *supra* note 39 at 64-72.

their right to continue to live in their community.<sup>86</sup> In the report *Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime*, a key recommendation is that the matrimonial home should remain with the custodial parent regardless of gender and that the well-being of children should be the number one priority.<sup>87</sup>

### c. Land registry

Recommendations from *A Hard Bed to Lie In: Matrimonial Real Property On Reserve* is that a registry of on-reserve family homes be created.<sup>88</sup> The report, *Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime* recommends that matrimonial homes be registered jointly in the names of both spouses.<sup>89</sup> For families off reserve, provinces maintain provincial land registries, which list the registered owners and any charges against the land. There is a current Indian Lands Registry that lists certificates of possession issued by the Department of Indian and Northern Affairs, but not custom allotments. Criticisms of the Indian Lands Registry are that it is not reliable, correct or current.

### d. Other issues

The Native Women's Association of Canada recommends that certain principles be recognized in any new legislation or amendments:

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

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<sup>86</sup> *A Hard Bed, supra* note 43.

<sup>87</sup> Abbott, *supra* note 39 at 64-72.

<sup>88</sup> *A Hard Bed, supra* note 43.

<sup>89</sup> Abbott, *supra* note 39 at 64-72.

*A Hard Bed to Lie In: Matrimonial Real Property On Reserve* recommends that appropriate funding be given to national, provincial/territorial, and regional Aboriginal women's associations to undertake thorough matrimonial property consultations.<sup>90</sup> As noted earlier, the lack of consultation with Aboriginal groups is one of the criticisms of the new matrimonial property bill introduced by the federal government.

*Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime* recommend that there be:<sup>91</sup>

- Legal education about rights on reserve, including a legal advocate and a manual of resources for Aboriginal women and a band policy manual for everyone
- More affordable housing, both on and off reserve
- More support through funding, support workers, and counselling
- Education and training
- Priority for healing and health priorities
- Band accountability
- Family and elder involvement in decision making
- Community feast, conferences, and community action committees.

## 5. Conclusion

The gap in the matrimonial property regime on reserve is a result of the *Indian Act* and the inapplicability of provincial family law to reserves. In the cases of *Derrickson* and *Paul*, the Supreme Court of Canada held that provincial family legislation, which deals with division of property, does not apply to reserves, which results in Aboriginal people not receiving fair and equitable treatment and compensation when their relationship ends.

Colonization has disrupted every aspect of Aboriginal life on reserve for men, women, youth, and elders as well for as the community as a whole. The disruption includes changes to the distribution of matrimonial property when a marriage ends on reserve. In the context of divorce or separation on reserve, Aboriginal women are often powerless, without political or economic support, and sometimes receiving nothing when their marriages end. The legislative matrimonial property gap has affected

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<sup>90</sup> *A Hard Bed*, *supra* note 43.

<sup>91</sup> *Abbott*, *supra* note 39 at 64-72.

Aboriginal women and children the hardest, although Aboriginal men may also be victims.

Consultation took place in 2006 and 2007 with many Aboriginal organizations, and new federal legislation to address the vacuum of matrimonial property laws on reserve may soon be forthcoming. As well, there are a variety of proposals and solutions being put forward to resolve the gap, such as amending the federal Indian Act, creating brand new federal legislation, applying provincial legislation on reserve, and recognizing First Nations inherent powers of self-government. Any solution has to address key concerns such as forms of dispute resolution, domestic violence, children, land registration, and other related issues.

The lasting solution is one that comes from the community and builds on Aboriginal traditions. These traditional values of caring, nurturing, supporting, and respect are the proper way forward, not just for Aboriginal women but for everyone, young, old, male, *and* female. The community is the solution.

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