

BRIEF

PRESENTED TO

SENATE COMMITTEES AND PRIVATE LEGISLATION DIRECTORATE

Study upon key legal issues affecting the subject of
on-reserve matrimonial real property on the breakdown
of a marriage or common law relationship and
the policy context in which they are situated.

By

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A. INTRODUCTION

We are pleased that the Senate Committee on Human Rights has undertaken the study of the issue of matrimonial rights to real property on Indian Reserves. This is an issue which has long been a source of extreme difficulty for First Nations women in Canada. Indeed, Quebec Native Women has often appealed to the Government of Canada for action in this regard.

But the difficulties faced by First Nations women in regard to matrimonial property on Indian Reserves are actually symptomatic of a much larger problem.

The underlying problem is that the Government of Canada continues to openly and knowingly discriminate against First Nations women. This unfortunate type of “leadership by example” further encourages First Nations governments to do so as well.

Since 1974, the Quebec Native Women’s Association has actively denounced the injustices caused by the *Indian Act*. In particular, since 1984 we have presented a number of briefs and position papers to various entities including: the Brief presented to the Standing Committee on Indian Affairs and Northern Development on Bill C-47 in June 1984; the Brief to the Parliamentary Sub-Committee on Equality Rights in 1985; the Brief presented to the Standing Committee on Indian Affairs and Northern Development in March 1986; the Report on the implementation of Bill C-31 presented to the Standing Committee on Aboriginal Affairs and Northern Development in February 1988; the Brief presented to the First Nations’ Circle on the Constitution in 1992; the Brief filed with the Royal Commission on Aboriginal Peoples in 1993, the Brief to the Department of Indian Affairs and Northern Development on the *Indian Act* in 2002, the Brief to the Standing Committee on Indian Affairs and Northern Development on Governance (Bill C-7) in 2003, to name but a few.

Canada is a party to several international treaties which guarantee equality between men and women and forbid all forms of discrimination. It is also party to a Convention which

specifically protects the rights of children. Furthermore, it is subject to the jurisdiction of several international institutions¹ established to ensure that States which, like Canada, **freely and voluntarily** become parties to international legal instruments, respect their obligations. Discrimination against the children and grand-children of First Nations women who regained their status under section 6(2) of the *Indian Act* and the unequal patrimonial rights of spouses and the adverse consequences of this situation in a divorce are incompatible with Canada's international obligations.

The Government of Canada has been repeatedly told for more than a decade that it is violating both the Constitution of Canada and its obligations under international law, yet it has refused to act to end the discrimination.

B. MATRIMONIAL REAL PROPERTY ON RESERVE

The Supreme Court of Canada has decided that provincial laws relating to division of property upon divorce cannot apply to real property on Indian reserves. The *Indian Act* is simply silent on this issue. Historically, lands and houses were usually registered by DIAND in the male spouse's name. This all too often leaves women with no economic power and, in the case of divorce, a woman and her children find themselves homeless.

As the Aboriginal Justice Inquiry of Manitoba pointed out, quite aside from questions of legality, the lack of protection and fair treatment for aboriginal women encourages and leads to other forms of discrimination against them by both DIAND and by band councils.

¹ *Inter alia*: Human Rights Committee; Inter-American Commission on Human Rights; Committee for the Elimination of all Forms of Discrimination against Women

“There is no equal division of property upon marriage breakdown recognized under the *Indian Act*. This has to be rectified. While we recognize that amending the *Indian Act* is not a high priority for either the federal government or the Aboriginal leadership of Canada, we do believe that this matter warrants immediate attention. **The Act’s failure to deal fairly and equitably with Aboriginal women is not only quite probably unconstitutional, but also appears to encourage administrative discrimination in the provision of housing and other services to Aboriginal women by the Department of Indian Affairs and local governments.**”² (emphasis added)

The Aboriginal Justice Inquiry of Manitoba specifically recommended that:

“The *Indian Act* be amended to provide for the equal division of property upon marriage breakdown.”³

Canada’s failure to take these recommendations into account is contrary to its international obligations. As recalled by the Human Rights Committee in its General Comment 28 on Equality between men and women:

In becoming Parties to the Covenant, States undertake, in accordance with article 3, to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and in accordance with article 5, nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights provided for in article 3, or at limitations not covered by the Covenant. Moreover, there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existent pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.⁴

At the same time, the Committee reminded all States Parties to the Covenant that:

² *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, p. 485

³ *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, p. 486

⁴ *Equality of rights between men and women (article 3)*: 29/03/2000, CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28, para. 9.

To fulfill their obligations under article 23, paragraph 4, States must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to.... the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States should review their legislation to ensure that women have equal rights in regard to the ownership and administration of such property where necessary.

[...]

States must also ensure equality in regard to the dissolution of marriage.⁵

Discrimination against women has been defined in article 1 of the *Convention for the Elimination of all Forms of Discrimination Against Women* as follows:

the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Under the *International Covenant on Civil and Political Rights*, there is an express obligation to protect equality of rights of spouses.

The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, **but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant.**⁶

⁵ *Id.*, para. 25-26

⁶ *Non discrimination: 10/11/89, CCPR General Comment 18, para.5 (emphasis added)*

In the same way, paragraph 4 of article 17 of the Inter-American Convention on Human Rights also provides that there is a **positive duty** to see to the protection of equality rights for spouses:

4. The States Parties **shall take** appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

The rights which must be protected against discrimination are not limited to those listed. Any legislation adopted by Canada must be non-discriminatory:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. Its prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.⁷

Therefore, Canada can be held internationally liable for not amending the discriminatory provisions of the *Indian Act*, and for not ensuring First Nations women of the same patrimonial rights as their spouses.

Traditionally, aboriginal women played an important economic role in their societies whether through their efforts at farming, their skill in gathering of food, preparation of clothing and preparation of furs for market, to name but a few. A family unit could not survive without the economic input of both men and women. The imposition of European values in which men controlled access to goods and services, including land and housing, was a major disruption to the foundation of the aboriginal family.

This balance must be redressed, but it cannot be redressed by simply providing for a “return to tradition” as some have suggested. That is a simplistic notion which will only cause more misery.

First Nations societies can no more turn back the clock 600 years than can the rest of the world, and to naively suggest that they can is to invite disaster. Six hundred years ago, our hunting and gathering or agricultural societies had many fewer material goods, but much greater, and more egalitarian, access to land and resources than we have now. Extended family groups or clans may have had more or less exclusive rights of use of certain areas for particular purposes but, six hundred years ago, the concept of individual “ownership” of a parcel of land was largely in-existent in our societies. Six hundred years ago, housing was neither difficult to obtain, nor in most cases did it represent a major investment of whatever “wealth” a family might have had. To suggest that the social systems which may have been effective six hundred years ago could work equally as well in the present day situation is wishful thinking.

Canada has all too often refused to act to eliminate discrimination against First Nations women on the pretext that it does not wish to interfere in the internal workings of First Nations. Canada must accept that it is responsible for the present situation and must act to correct it. The Government of Canada is bound by its own Constitution and by its obligations under international law. It cannot, **on any pretext**, create enclaves within its borders in which it permits the routine violation of basic human rights. Rather, it has a clear **duty to act** to protect the basic human rights of all those within its borders.

The *Indian Act* should be amended to provide either for a regime in which spouses are common as to property or for the similar regime of community of acquests in which property acquired during the marriage becomes the common property of both spouses. This would have

⁷ *Non discrimination: 10/11/89*, CCPR General Comment 18 para.12

to be done retroactively in the same way as the marriage regime was retroactively changed in Quebec for all Quebeckers. Failing this, the *Indian Act* must be amended to provide for an equal division of property upon the dissolution of the marriage and must ensure that whichever parent has custody of the children is able to remain in the family home.

Furthermore, the *Indian Act* must be amended to ensure that a woman whose First Nation affiliation was changed as a result of her marriage to a man from another First Nation, has an automatic right to be re-registered, along with her children, as a member of her original First Nation.

C. CONTINUING DISCRIMINATION IN THE *INDIAN ACT*

We have stated that the lack of protection for women in regard to matrimonial real property is symptomatic of the much larger problem of Canada's continued discrimination against First Nations women. You are surely aware of the continuing discrimination against reinstated women and their children under the amended *Indian Act*. The *Indian Act* cuts off entitlement to "Indian" status after two generations if one parent does not have "Indian" status. Among other adverse consequences, this leads to situations where members of the same family may not all be entitled to the same rights.

The Standing Committee on Aboriginal Affairs and Northern Development held six months of hearings on the implementation of Bill C-31 and published its report in 1988. In its report, at pages 30-36, the Standing Committee noted that there were a number of examples of residual sex discrimination in the amended *Indian Act*. It concluded:

"Most Indian groups, whether status, non-status, including native women's groups, agreed that the 1985 amendments do not go far enough in recognizing Indian status for persons of mixed Indian and non-Indian heritage. While most also appear not to favour any arbitrary cut-off point, a uniform Quarter Descent Rule would at least place reinstated women on an equal footing with their brothers and would help to allay the fears of an ever-decreasing population of status Indians as a result of s. 6(2) and current rates of status/non-status intermarriage."

The Standing Committee then recommended (Recommendation #11) that s. 6(2) of *An Act to Amend the Indian Act, 1985* be amended **before the end of the current session of Parliament** in order to eliminate discrimination between brothers and sisters. This was in 1988! **Fifteen years later**, nothing has been done.

The *Act to amend the Indian Act, 1985* (Bill C-31) required the Minister to table a report on the implementation of the Act no later than two years following assent. The Minister did so, but concluded that it was too soon to determine the impacts of the amendments. He thus undertook to carry out a full review of the implementation of the Act and to report by 1990. This was done, and in the Minister's "Report on the Impacts of the 1985 Amendments to the *Indian Act*", the following was noted (at p. 8):

"Not all sexual discrimination has been eliminated by Bill C-31. There remains unequal treatment of some male and female siblings. Women who lost status through marriage prior to 1985 cannot pass status along through successive generations; their brothers who married non-Indian women prior to 1985 can do so. The brothers, their non-Indian spouses and their children, are automatically considered band members, while their sisters' children can only acquire status. In the case of bands that have assumed control of membership prior to June 28th, 1987, the children of the female line have only conditional entitlement to band membership."

The Minister of Indian Affairs and Northern Development thus acknowledged **thirteen years ago** that the *Indian Act* continued to discriminate against "Indian" women and their children. However, he made no attempt to introduce legislation to remedy this continued violation of our rights.

The *Report of the Aboriginal Justice Inquiry of Manitoba*, 1991, (at p. 203-204) pointed to the fact that "Despite the amendments intended to remove discrimination, the *Indian Act* today still contains clear forms of sexual discrimination - as well as the seeds of eventual termination of

Indian status altogether.” It recommended that the *Indian Act* be amended to eliminate all continuing forms of discrimination regarding the children of “Indian” women who regain their status under Bill C-31.

Continuing violations of Canada’s international obligations

We have argued before that the various forms of differential treatment in the *Indian Act* were incompatible with Canada’s international obligations, as reported in 1988 by the Standing Committee on Aboriginal Affairs:

Accordingly the Quebec Native Women’s Association says the right of 12(1)(b) women with non-Indian spouses and non-member children to live on reserve with their families is not guaranteed.

They argue that the various forms of differential treatment described above violate a variety of domestic and international human rights standards. The restricted ability of Indian women to pass on Indian status and band membership to their children and grand-children is said to be discrimination on the basis of sex and descent and therefore a violation of

- s. 15 of the Canadian Charter of Rights
- ss. 2 and 7 of the Universal Declaration of Human Rights
- ss. 1, 2(1), 3 and 26 of the International Covenant on Civil and Political Rights
- s. 1(1) of the International Covenant on the Elimination of all Forms of Discrimination.

In addition, the more limited ability of Indian women to reside on reserve with their families is alleged to be a violation of s. 17(1) of the International Covenant on Civil and Political Rights.⁸

The developments in international law over the years lead to the clear and inescapable conclusion that the Government of Canada continues to violate its international obligations by discriminating against First Nations women and their children.

⁸ *Fifth Report of the Standing Committee on Aboriginal Affairs and Northern Development on consideration of the implementation of the Act to amend the Indian Act as passed by the House of Commons on June 12, 1985, August 1988, pp. 33-34.*

The Human Rights Committee has underlined the fundamental character of non discrimination:

Non discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.⁹

The importance of this principle is clearly reflected by the fact that it tolerates no derogation whatsoever, even in times of public emergency.

However, the regime which flowed from Bill C-31 has created significant inequalities among First Nations children and as such, it is incompatible with Canada's international obligations. A child born of a marriage contracted before 1985 whose father is non-"Indian" and whose mother regained her status under section 6(1) of the *Indian Act* may be deprived of the possibility to pass his or her "Indian" status on to his or her children, contrary to a child , also born of a marriage contracted before 1985 whose father is "Indian" and whose mother is non-"Indian". In addition, children of women who regained their status under section 6(2) of the *Indian Act* may be denied band membership.

This regime has also created significant inequalities among First Nations women because they are not all able to pass their status on to their children, an inability which carries grave consequences.

The First Nations child deprived of his or her status, or of band membership, is thus deprived of the right to take part in the life of his or her community, contrary to the provisions of Article 27 of the *International Covenant on Civil and Political Rights*, to the almost identical provisions of Article XIII of the *American Declaration of the Rights and Duties of Man*, which binds Canada since it became a member of the Organization of American States, in January of

⁹ *Non-discrimination: 10/11/89, CCPR General Comment 18* (General Comments)

1990, and of article 30 of the *Convention on the Rights of the Child*.

The First Nations child who is deprived of status or denied band membership is thereby deprived of the best means of preserving his identity, a right guaranteed under article 8 of the *Convention on the Rights of the Child*:

1. States Parties undertake to respect the right of a child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Under the terms of Article 4 of the *Convention on the Rights of the Child*, Canada has also undertaken to adopt the necessary legislative, administrative and other measures to implement the rights protected under the Convention. Upon ratifying the Convention, it made the following declaration:

It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.

It is unfortunate indeed that the Government of Canada has not yet seen fit to put its words into action.

Last year, in its Concluding Observations on the implementation of the *Convention on the Elimination of Racial Discrimination*, the Human Rights Committee stated the following:

The Committee is concerned that some aspects of the Indian Act may not be in conformity with rights protected under article 5 of the Convention, in particular the right to marry and to choose one's spouse, the right to own property and the right to inherit, with specific impact on Aboriginal women and children. The Committee recommends that the State party examine those aspects, in

consultation with Aboriginal peoples, and provide appropriate information on this matter in its next periodic report.¹⁰

International bodies have come to the same conclusion as Canadian courts in holding that the principle of non-discrimination does not mean that all persons have to be treated in an identical fashion. Differences in treatment which are based on reasonable and objective criteria will not necessarily be incompatible with a State's international obligations. In fact, some situations may call for a different treatment. However, in all cases the measures will only be justifiable if they aim at correcting discrimination:

..as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.¹¹

The conditions have been spelled out by the Human Rights Committee:

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.¹²

The differential treatment of First Nations women and their children is not intended to "correct discrimination in fact". Its aim is to restrict the number of status "Indians" within the meaning of the *Indian Act* and its effect is to create a new situation of discrimination in fact. Consequently, it does not achieve a purpose which is legitimate under the Covenant. In fact, that is what the Human Rights Committee told Canada in April of 1999:

¹⁰ Committee on the Elimination of Racial Discrimination: Concluding Observations, 01/11/2002; A/57/18, para. 332

¹¹ *Id.*, para. 10.

¹² *Id.*, para. 13

The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the *Lovelace* case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.¹³

The Canadian Government has yet to show any sign of its intention to comply with the recommendations of the Committee.

The amendments to the *Indian Act* originally proposed by the Liberal government in 1984, just before Parliament was prorogued (Bill C-47), and which were assented to by the House of Commons, allowed for the reinstatement of women who had lost their status through marriage, their children and, in most cases, their grandchildren. The reinstatement was to both "Indian" status and to band membership.

After the 1984 election, it was the newly elected Conservative government which moved to narrow the eligibility for reinstatement, and to create the distinction between registration as an "Indian" and registration as a band member. It should not be difficult for the present day Liberal government to return to the principles of equality it espoused in 1984 and amend the *Indian Act* to do away with the sex discrimination which remains in the *Act* in order to allow for the registration of the grandchildren of reinstated women. Not to do so would be a continuing violation of Canada's obligations both under its own Constitution and under international law.

D. CONCLUSION

In summary, it is clear that both on a national and on an international level, the entities which have looked at this problem have all concluded that the residual sex discrimination in the

¹³ *Concluding Observations of the Human Rights Committee: Canada., 07/09/99. CCPR/C/79/Add. 105*

Indian Act is in violation of Canada's own constitution as well as its international obligations. It is also clear that the federal government is fully aware that this is the case. The only question is whether or not the Government of Canada is sufficiently concerned with the protection of human rights to take the action required to eliminate this legislated discrimination. The fact that there may be opposition from some of the entrenched aboriginal leadership whose self-interest leads them to resist any change to the *status quo*, cannot serve as an excuse.

Canada cannot legitimately allow the creation of enclaves within its borders in which there are no guarantees of basic human rights.

To date, the Government of Canada's refusal to ensure the basic human rights of First Nations women and their children has only served to encourage First Nations governments to continue to discriminate against us. The issues relating to matrimonial real property cannot be separated from this context.

We expect the Government of Canada to take the initiative to amend the *Indian Act* so as to eliminate all discriminatory provisions and to put an end to discriminatory policies within the Department of Indian Affairs. We expect the Government of Canada to legislate so as to ensure equal rights for woman in regard to matrimonial property. We also expect the Government of Canada to live up to its constitutional obligation to ensure that powers exercised by First Nations governments are exercised in a manner compatible with the *Canadian Charter of Rights and Freedoms* and the international human rights covenants and conventions to which Canada is a party.

We re-iterate:

- a) the Standing Committee found that the *Indian Act* continued to discriminate against women in 1988;
- b) the Minister of Indian Affairs admitted that there was continuing discrimination against women in 1990;
- c) the Aboriginal Justice Inquiry of Manitoba, led by the Associate Chief Justice of that province, found in 1991 that the *Indian Act* continued to discriminate against women and that the fact that the *Indian Act* failed to protect women in the case of marriage breakdown encouraged administrative discrimination against First Nations women by both the Department of Indian Affairs and by First Nation governments;
- d) the United Nations' Human Rights Committee found that the *Indian Act* continues to discriminate against First Nations women.

We are confident that a Canadian Court would come to similar conclusions. The Government of Canada has two choices - it can either amend its legislation now in order to conform with its domestic and international obligations, or it can wait until a court declares the registration scheme under the *Indian Act* to be invalid and deal with the fallout and confusion which will inevitably result.

Recommendations

The Quebec Native Women's Association therefore recommends the following:

1. That the *Indian Act* be amended so as to eliminate all forms of discrimination against women. This would require the reinstatement to both "Indian" status and band membership of not only the women who lost their status as a result of the historical discrimination against them, but also of their children and grandchildren;
2. That the *Indian Act* be amended to ensure equality between men and women in regard to matrimonial property and to ensure that there is equality in the division of assets in the case of the breakdown of the matrimonial relationship;
3. That the *Indian Act* be amended to ensure that the parent having custody of the children be able to remain in the family home in the event of the breakdown of the matrimonial relationship.
4. That the *Indian Act* must be amended to ensure that a woman whose First Nation affiliation was changed as a result of her marriage to a man from another First Nation, has an automatic right to be re-registered, along with her children, as a member of her original First Nation.