

POLICY SERIES



Defending matrimonial property legislation

Why justice for indigenous women does not jeopardize self-government

By Joseph Quesnel



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Executive Summary

The House of Commons is currently considering a Senate government bill (S-4, *Family Homes on Reserves and Matrimonial Interests or Rights Act*) designed to fill the legislative gap in equitable matrimonial laws on reserves.

- This issue has been studied for years, including by the United Nations, and always involves recommendations for clear legislation. First Nations lack legal authority to enact laws in this area.
- Jurisdictional issues have stymied and prevented passage of legislation, as many indigenous leaders oppose any non-indigenous authority enacting laws in this area.
- On issues of fundamental justice like this, indigenous leaders should not play politics with the lives of women. Just like Jordan's Principle, jurisdictional battles should give way to immediate remedies, such as Bill S-4 in this case. Jordan's Principle involved recognizing that where there are jurisdictional conflicts on who is to care for First Nations, serving people should take precedence over the conflict.
- Bill S-4 is a measure that allows both self-government and fundamental justice, as it empowers band governments to enact and enforce matrimonial property rules. So, it respects indigenous rights of self-government while enforcing fundamental justice for on-reserve women. It also provides for federal, not provincial, jurisdiction, which is preferred by First Nations.
- The Frontier Centre conducted an informal survey of First Nations in Manitoba, Saskatchewan and Alberta about matrimonial property rights and found the majority supports equal division of assets in case of marital breakdown.
- First Nations should not view federal interim rules as a threat to self-government, as its jurisdiction is temporary and calls for indigenous communities to enact rules.
- First Nations should support Bill S-4 as a compromise and work immediately to create band-level laws on matrimonial property division.
- Another remedy is the *First Nations Land Management Act* (FNLMA), which requires participating First Nations to adopt matrimonial property laws. The FNLMA is also better economically for indigenous communities, as shown by a recent study.
- First Nations, however, should not hide behind FNLMA to avoid dealing with the full property ownership debate on reserves. The FNLMA is better but not as good as full property rights.
- Aboriginal organizations should deal with these matters immediately and not oppose Bill S-4 because it does not deal with housing issues or lack of shelters.

Background

The House of Commons is currently studying Bill S-4, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. The bill was first introduced as Bill C-47 during the 2nd Session of the 39th Parliament. Bill C-47 died on the order paper when Parliament dissolved in September 2008. Reintroduced as Bill C-8 during the 40th Parliament, it died again on the order paper when Prime Minister Harper prorogued Parliament in December 2009. The Leader of the Government in the Senate introduced Bill S-4 on March 31, 2010. The Senate passed it, and it is proceeding through the House.

If there was ever an issue that has been studied to death, it is matrimonial property rights. It has been long recognized that because reserve lands are under federal jurisdiction under Section 91 (24) of the *Constitution Act, 1867*, couples residing on reserves in matrimonial homes do not have access to the provincial legislation that ensures an equitable division of assets and the marital home after the breakup of a relationship. As with so many other issues, the federal *Indian Act* does not provide rules for this situation. The influential Supreme Court of Canada *Derrickson v. Derrickson* ruling [1986] also found that provincial courts lacked the power to legislate on reserve lands for the purpose of matrimonial property issues.¹

In its November 2003 report "A Hard Bed to Lie In: Matrimonial Real Property on Reserve", the Standing Senate Committee on Human Rights recommended amending the *Indian Act* to allow for the application of provincial and territorial matrimonial property laws on reserves. The House of Commons Standing Committee

on Aboriginal Affairs and Northern Development dealt with the same issue in June 2005 with its own report, "Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property". This time, the report called for legislative change, including either interim stand-alone legislation or amendments to the *Indian Act*. The recommendations called for a recognition of First Nations' inherent jurisdiction with respect to matrimonial real property (i.e., land and homes). When married couples divorce, the division of matrimonial property is determined by provincial law, as these areas are enumerated in the Constitution as provincial.

As it is, band councils operating under the *Indian Act* do not possess the jurisdictional power to create and enforce rules governing matrimonial property. Margot Geduld, a spokesperson for Indian and Northern Affairs Canada, confirmed that Section 81 of the *Indian Act* (the section enumerating band council bylaw authority) does not grant band councils authority on this issue.² In its current form, Bill S-4 does provide this authority to band councils. It was a specific selling point of the legislation to First Nations, as it would grant them the jurisdiction to make laws in this area. While some First Nation activists and leaders will decry the fact that the legislative power in this case is being delegated from the federal government (and is not a recognition of inherent authority in this case³), the fact remains that the legislation creates this power for First Nations.

When the initial legislation dealing with matrimonial property was introduced in the House of Commons, several Aboriginal organizations opposed it.⁴

The most common complaint was that the legislation granted other governments (federal or provincial) the power to enact laws in this area (matrimonial property), and it did not grant it to First Nations.

While all of the organizations in question claimed that they supported the move in principle, all had problems with various aspects of the legislation. The most common complaint was that the legislation granted other governments (federal or provincial) the power to enact laws in this area, and it did not grant it to First Nations. Despite the federal government having the authority to make laws surrounding “lands reserved for the Indians,” these organizations believe the issue could be better addressed at the local First Nation level. Other complaints were aimed at the ability of on-reserve First Nation women to access provincial courts for the purposes of redress, especially in marital breakdowns involving domestic violence. Others decried that the law did not deal with housing shortages on reserves, the lack of shelters on reserves as well as a host of other non-legislative problems.

This paper argues that Bill S-4 in its current form is the best response to the present problem. While it does not deal with some of the issues associated with the problem (such as lack of housing, shelters, etc.), it recognizes the fundamental justice aspects of the

problem and provides eventually for First Nation communities to deal with the issue on their own.

The Frontier Centre for Public Policy conducts surveys in First Nation communities every year, and last year asked questions relating to matrimonial property and other (mainly women’s) issues. By a substantial majority, both women and men on First Nations in Manitoba, Saskatchewan and Alberta support an equitable division of marital assets in the event of marital breakdown. It should be stated, however, that because the issue is one of fundamental justice, even if a majority sided against equal rules, it would not affect the fact that First Nation women are entitled to equal rules. Moreover, First Nation respondents are also concerned about how their band governments are dealing with issues of interest to women, including measures to protect women from violence and involve them in decision-making.

Thus, this report looks at these survey results and makes the argument that the proposed legislation is necessary, and it looks at legislative and non-legislative changes that should accompany this bill. It also looks very closely at the problems faced by women on reserves. The paper looks at how the absence of robust property rights exacerbates this problem of marital breakdown. It also looks at arguments related to self-government for First Nations as well as powerful arguments in favour of immediate justice for women.

Problems with the existing legal framework

It is long recognized that First Nation women are one of the most vulnerable, if not the most vulnerable, segments of Canadian society. The poverty experienced by First Nation women is well below the Canadian average. If it were possible to construct a metaphorical totem pole of descending socio-economic status, First Nation women living on reserve would be at the bottom of it. Add to that Bill C-31 women—who have applied for Indian status and band membership reinstatement since the 1980s—and you have some of the poorest of the poor.

For decades, First Nation women's organizations have decried the powerlessness and marginalization of women within First Nation communities and organizations. Whether patriarchal structures were part of pre-contact indigenous society or were created by the colonial *Indian Act* is immaterial to the reality at hand: Women are disadvantaged on reserves.

The problem is how this marginalization intersects with the modern matrimonial property rights issue. The *Indian Act* was amended to allow First Nations to obtain Certificates of Possession (CPs), which grant them exclusive rights to a particular parcel of property on a First Nation reserve. CPs require approval from the band council and the Minister of Indian Affairs.⁵ It has been shown that women, although they are not prevented from obtaining them, are the minority CP holders. One hypothesis as to why men are the majority holders is that often First Nation women leave their home reserve when they marry First Nation men and assume membership in their spouse's

band. The man would often have a CP in his family name.

Problems arise when a relationship breaks down, especially if one of the partners is non-Aboriginal. Women who face the breakdown of a relationship often find they must appeal to the mercy of the local band council for some form of redress, especially if they are dealing with domestic abuse (which affects First Nation women disproportionately more than non-Aboriginal women⁶). Often, women complain that band councils politicize the situation and favour the male spouse. The other problem is that women who face this situation must often leave the reserve due to the lack of shelters or alternative accommodations on the reserve. Given the jurisdictional issue, they cannot turn to provincial courts. If they are non-Aboriginal, they may be denied the right to reside on the reserve and often must leave with few resources.

While some First Nations have localized rules for dealing with matrimonial property issues, and they deserve recognition and admiration for that, most likely do not or do not possess the legal power to enforce these decisions. In the long term, Bill S-4 will provide that power so that First Nations can enforce their rules.

Where contention continues is the fact that Bill S-4 provides authority for the introduction of interim federal rules on matrimonial property rights on reserve in the absence of First Nation laws. The introduction of federal rules deals with many First Nation complaints that provincial laws or courts are not appropriate for them given that "Indians and lands reserved for the Indians"

are a federal responsibility. However, the insistence on some immediately applicable federal rules—even if they are interim rules—continues to threaten some indigenous leaders who view the issue as one of inherent First Nation jurisdiction.

Self-government or fundamental justice?

First Nation communities and particularly their leaders often feel torn when these issues arise. Many are divided between their belief in inherent jurisdiction and their commitment to justice. The author of this report would be inclined, as are many sources, to view this question as not merely an economic or property rights issue, but one of fundamental justice, in this case the value of gender equality. The historic patterns of property title distribution that favour men, as well as those of jurisdictional struggles, seem to conspire to place women in an untenable situation. Non-Aboriginal women who have entered into a conjugal relationship (either married or common law) with a First Nation spouse find themselves even more vulnerable, as bands are able to deny them the right to reside on the reserve, especially if they ended the relationship with their indigenous partner.

In an ideal situation where all 600 plus First Nation bands under the *Indian Act* have relatively similar and equitable matrimonial property rights distribution rules, this would not be a problem. Notwithstanding that it is a very good legal idea to enshrine this legal power for band councils (as Bill S-4 would do), uniform rules would render the matter somewhat moot.

Since this matter concerns fundamental justice for First Nation women, it would

be the case that First Nations are morally obligated to enact just laws concerning matrimonial real property. However, most indications are that the majority of band councils has not enacted laws.

One way around this is through passage of the *First Nations Land Management Act*, a comprehensive piece of legislation that allows participating bands to opt out of the land management provisions of the *Indian Act*, and it involves a democratically ratified First Nation land code. Although reserve lands remain Indian lands under Crown title, the framework at least allows bands to control land use, which improves the economic productivity of reserve lands. Part of the *FNLMA* is a requirement for bands to develop rules governing matrimonial real property. Section 17 of the *FNLMA* requires bands to develop rules governing the breakdown of marriage on reserves. While this is clearly positive, it would appear that not all First Nations under the *FNLMA* have adopted these rules. From speaking with people in Indian and Northern Affairs Canada, it appears that only 14 of the 30 bands under *FNLMA* have operating rules on matrimonial real property. There are also 11 bands currently developing land codes, so it remains to be seen how quickly these bands develop matrimonial rules.

Given that most bands that are required to adopt matrimonial property laws have not done so, how long can we assume it would take for bands that are not under such requirement to do so?

This paper recognizes the logic of First Nations having the ability to set these rules. It would be rational for First Nations to possess this power since they are able to determine the processes that reflect local circumstances and traditions. These rules are also more likely to be seen as more legitimate than ones imposed from

above are. The problem, however, is the current uneven and oftentimes unknown existence of clear and equitable rules at the First Nation level.

Of course, one could argue that one solution is to grant authority to First Nations and to allow them to pass these laws over time. However, it seems unlikely that all these communities would enact these laws all at once or would even be capable of doing so. Capacity and specialized knowledge at the local level would remain a concern for many, if not most, communities.

In the absence of interim federal rules (which arguably from an indigenous viewpoint are preferable to permanent provincial jurisdiction over the issue), it would appear that the situation would involve ongoing injustices against mainly First Nation women. This would be further exacerbated by potentially diverse matrimonial property rights regimes. While this could be positive in the sense of adding local and traditional input into laws, it could mean differing standards of justice for women. Some positive uses could be the addition of mediation and arbitration measures rooted in indigenous traditions that could help resolve the problems. However, there could still be a situation where women are left vulnerable.

Taken from the viewpoint of First Nation women in these situations, it would seem that they would demand justice now, not in the intermediate, precarious future. According to preliminary polling by the Frontier Centre, respondents across the Prairies think that laws are not protecting women and that their active input on community concerns is not being sought often enough. It would stand to reason that Bill S-4 would be a favourable compromise, as it provides for immediate justice (interim federal rules call for

“The continuance of federal jurisdiction and paternalism for a temporary period for the sake of providing immediate justice and protection for women seems like an honourable compromise, especially from the perspective of women denied equal rights.”

emergency protection orders in case of violence, etc.), yet creates the self-governing jurisdiction for First Nations to generate their own rules and to replace federal rules once their rules come into force. It would seem logical that this represents the best of the values and goals sought after by First Nations.

The continuance of federal jurisdiction and paternalism for a temporary period for the sake of providing immediate justice and protection for women seems like an honourable compromise, especially from the perspective of women denied equal rights. Men and women are granted equal rights in the Charter of Rights and Freedoms under Section 15. This seems even more compelling when one considers that even Aboriginal collective rights under Section 35 include a specific clause (Clause 4) that guarantees Aboriginal and treaty rights for both sexes equally.

While matrimonial real property rules on reserve do not all have to look the same, it would stand to reason that they should all create equal rules for both sexes.

Given that First Nations are citizens and, more importantly, human beings, their treatment by government actors is subject to universal norms of human rights and dignity. The United Nations recognized that the situation affecting First Nation women on reserve is a violation of international human rights norms.

It would seem that the inherent problem is one of conflict between democratic rule and liberalism. Democracy includes the rights of a majority to enact enforceable laws. It is the idea that government's power comes from the people and that the people, or their representatives, rule.⁷ It is not necessarily about fundamental individual rights. Liberalism is defined as the ability of individuals or minorities to assert their rights before hostile majorities. U.S. liberal theorist Ronald Dworkin epitomized this idea of a right as a "trump."⁸ First Nations assert that they possess inherent jurisdiction over their lands, resources and community life. Thus, they argue for the right of democratic rule and jurisdiction. They could claim that democratically they would have the mandate from their voting communities to pass laws. Without getting into the debate over which powers properly belong to First Nation communities, a problematic and judicially contested area, it would seem

indigenous leaders and organizations have a valid claim to contest these issues on jurisdictional grounds, either morally or perhaps legally. However, law-making is only one part of the equation. Not all rules within the legislative sphere are just or fair. The existence of liberal norms, such as freedom of opinion and expression, religious expression, association, gender equality and other individual rights, suggests that modern states now recognize that there are limits to law-making, even if done under the legitimacy of democratic rule. Our Charter declares itself the supreme law of the land (Section 52) and states that all laws, decrees and ordinances must be consistent with its norms.

Given that First Nations are citizens and, more importantly, human beings, their treatment by government actors is subject to universal norms of human rights and dignity. The United Nations recognized that the situation affecting First Nation women on reserve is a violation of international human rights norms.⁹ Given that all Aboriginal organizations recognize the Universal Declaration on Human Rights, they too ought to be convinced that First Nations should enjoy liberal human rights that no government, including indigenous ones, can take away. After all, groups like the Assembly of First Nations (AFN) criticize the federal government's move not to sign the Universal Declaration on the Rights of Indigenous Peoples. This agreement itself is subject to the terms of the Universal Declaration and is intertwined with global human rights norms. It would be very selective on their part if these same groups declined to enforce uniform matrimonial rules for First Nation women, in violation of those norms, but insist on the application of another instrument just because it is favourable to them.

Thus, it makes sense that First Nation leaders and Aboriginal organizations should welcome the introduction of Bill S-4 and work with the federal government to ensure that all bands enact comprehensive matrimonial property laws. It would seem that both universal and Charter rights to gender equality demand that First Nations accept interim federal rules.

This does not mean that First Nation communities and Aboriginal organizations should forget their struggles for autonomy and self-government. Applying interim federal rules as envisioned by Bill S-4 does not mean communities ignore their movement away from the *Indian Act* or abandon work with Ottawa and the provinces in achieving self-government, either through comprehensive or sectoral agreements (self-government is one particular area of governance or service delivery, rather than self-governing in all areas). It is a basic recognition that where fundamental justice and pressing questions of human rights are involved, political struggles should give way to a co-operative attitude and immediate remedy. After all, most changes that are envisioned for First Nation communities are legislative changes, not constitutional. They can still be changed in the future as political agreements and understanding evolve. The same can happen through judicial rulings. If Ottawa were demanding constitutional changes, it would make sense for Aboriginals and First Nations to become active and perhaps oppose them, but this is not the case.

In fact, oftentimes this confrontational and rejectionist attitude characterizes the mentality of many Aboriginal and First Nation leaders. One can think of the battle over the *First Nations Governance Act (FNGA)*, where the AFN and many First Nation chiefs opposed it mainly on jurisdictional lines, forgetting that the

It is a basic recognition that where fundamental justice and pressing questions of human rights are involved, political struggles should give way to a co-operative attitude and immediate remedy. After all, most changes that are envisioned for First Nation communities are legislative changes, not constitutional.

law was a simple statute that could be changed. The immediate results would have been improved governance and financial management. Because of the *FNGA* legislative death, First Nations continue to suffer with unresolved electoral and financial problems. At a basic level, First Nation citizens should not suffer real tangible harm because of political posturing over a law that can be changed with relative ease at a future time, especially when the matter involves fundamental rights.

Frontier Centre survey on women's rights

Our internal data suggest that on-reserve First Nation women strongly support, in principle, the idea of equitable division of assets in the event of marital breakdown. During our surveying for the fourth annual *Aboriginal Governance Index* (2009-2010), we asked three additional questions that went to the heart of women's rights on reserve.

The first question directly asked about matrimonial real property rights. We asked 1,091 male and female respondents in bands in Manitoba, Saskatchewan and Alberta if they favour an equal division of marital assets in the event of marital breakdown (77 per cent responded "definitely" or "perhaps"). Although this question did not ask respondents to measure this idea against the self-government or jurisdictional issue, it is not hard to figure out where most respondents would sit on the issue and to say that respondents would want some level of government to do something immediately about it, given their feelings on the matter.

At a minimum, it means bands should adopt equal matrimonial property rules right now.

Organizations like the AFN should support and help them immediately, in concrete ways.

This should prompt Aboriginal governments and organizations to pause and perhaps rethink their position. At a minimum, it means bands should adopt equal matrimonial property rules right now. Organizations like the AFN should support and help them immediately, in concrete ways. Second, given such strong opinions, it cannot be assumed that First Nation citizens, particularly women on reserves, would necessarily follow the logic of the AFN and others that self-government must always come before fundamental justice. Assuming these results are replicated on First Nation communities outside the Prairie provinces, it would also suggest a disconnect between major Aboriginal governments and organizations and their populations.

The two remaining questions in our survey show that indigenous respondents are doubtful that current First Nation government policies protect or advance the plight of women, as a strong minority do not think women are protected at the band level from violence. The second question asked 1,090 respondents whether they thought the band government was doing enough to protect on-reserve women from violence (usually from domestic partners). A troubling 42 per cent of respondents across the provinces said "not really" or "never" to this statement. Only 26 per cent said "perhaps" and only 21 per cent said "definitely." The last question asked 1,087 respondents if women are involved in community decision-making. Only 25 per cent of respondents said "definitely." About 30 per cent said "perhaps" and about 34 per cent said "not really" or "never."

“Aboriginal women need immediate action, not politicking.”

These disturbing findings suggest a large number of respondents think women are excluded from community decision-making. This may also mean that if women on the reserve are seriously under-represented on political bodies and within the decision-making apparatus, it may be much more difficult to change band laws surrounding matrimonial property, as the adverse effects of the legislative gap affect women more. This implies that more needs to be done to involve women in all levels of reserve life.

While some indigenous scholars and activists insist that in pre-contact times women were revered and empowered within indigenous societies, it is evident that they are not in many instances today. The fact that so many respondents thought that women were still not protected from violence on the reserve underscores the importance of finding concrete and immediate measures to protect women in case of marital breakdown, especially if this breakdown is precipitated by violence in the home. Aboriginal women need immediate action, not politicking. Policy-makers and parliamentarians realized the need to go beyond politics in the case of Jordan’s Principle, by which MPs supported a measure to put aside jurisdictional squabbles for the sake of children in instances of critical health care.¹⁰ A similar principle should apply in the case of vulnerable women on reserves.¹¹

Necessary reforms

This study strongly recommends that First Nations, particularly those within their influential elite, support Bill S-4. This bill provides a reasonable compromise between the need for fundamental justice for First Nation women on reserve and the desire for self-government held by indigenous communities. It can be argued that this bill actually provides the basis for self-government on this issue, as it explicitly grants jurisdiction to band governments to establish their own matrimonial property rights laws.

This study also strongly recommends that all First Nation governments immediately begin planning cogent, equal matrimonial property laws. Our Frontier Centre data show strong support for such actions (although our poll is not comprehensive, as our sample involves bands that voluntarily participate) on the Prairie provinces. There is no reason to assume this result would not hold for provinces and territories in the rest of the country. Whether the authority for equal matrimonial property comes from S-4 or not (if it fails to pass for some reason), it is a matter of fundamental justice to bring some level of resolution to this question. There is always the possibility of a stand-alone piece of legislation that would grant jurisdiction to First Nation governments to enact matrimonial property laws. First Nations can also work with local indigenous traditions in creating just remedies to this problem. Traditional arbitration and councils of elders are already being considered.

An alternative course of action is for all First Nations to opt into the voluntary FNLMA. As stated above, under Section

A new study by the accounting firm KPMG demonstrates that First Nations under the FNLMA are able to spur economic development on reserves faster than communities that still fall under the Indian Act.

17 of that legal framework, bands are required to enact matrimonial property laws. Beyond meeting those fundamental justice requirements, the *FNLMA* is a strong alternative to the land provisions of the *Indian Act*. Some of the wealthiest First Nation communities have been able to better capitalize on economic opportunities by adopting the *FNLMA*.¹² More affluent indigenous communities such as Westbank and Tsawwassen First Nations in B.C., the Whitecap Dakota First Nation in Saskatchewan and the Chippewas of Georgina Island First Nation in Ontario have been using the land management provisions to jump over regulatory hurdles and cut through red tape imposed by the *Indian Act*.¹³

A new study by the accounting firm KPMG demonstrates that First Nations under the *FNLMA* are able to spur economic development on reserves faster than communities that still fall under the *Indian Act*. Based on a sample of 17 First Nations that now independently manage their land under the system,¹⁴ the KPMG study says the program has generated \$101-million in investment and about 2,000 jobs. More encouragingly, the study also found that better governance practices, including more accountability and transparency, also come with the *FNLMA*.

While the Frontier Centre thinks it will be significantly better for First Nations to consider full property rights as provided for with the new First Nations Property Ownership Initiative,¹⁵ the *FNLMA* would be a good compromise for those seeking some self-governance and control over reserve lands but are not ready to proceed to full property rights while reserve lands remain Crown land. It also provides matrimonial property rights (albeit this is coming slowly, perhaps Ottawa needs to work more closely and assist First Nations seeking to enact matrimonial laws). It may be necessary to amend the law so that even First Nations under *FNLMA* fall under the interim federal rules provided by Bill S-4 until they adopt their own.

One important, unintended consequence of this option, however, is that some First Nations will think that the *FNLMA* is all they need for full prosperity, and they will avoid discussing the option of full ownership of their reserve lands, even though proponents of the First Nations Property Ownership Initiative have demonstrated that there is a legal basis to proceed on full property rights for First Nation communities. The *FNLMA* should not be seen as the end of land management issues for indigenous communities. It is better than just being under the *Indian Act*, but overwhelming evidence from the economic literature confirms that full property ownership for First Nations would provide increased productivity of land, rising property values and better solutions for housing shortages.¹⁶ The *FNLMA*, just like Certificates of Possession, is a piece in an incomplete puzzle. It should not prevent First Nations from debating and possibly adopting full property rights.

Other issues needing redress

Critics of previous versions of Bill S-4 are correct when they argue that the bill in and of itself does not correct all the problems associated with the marginalization of women on reserves. However, we should be aware that no bill could fix everything. The lack of secure housing on reserves is a long-standing problem that needs resolving, but it should not be used as an argument against providing basic protections for women in precarious situations. While these are critical problems that need addressing, it seems to be a red herring raised by Aboriginal groups to avoid dealing with the substantive issues raised by the matrimonial property bill. The same can be said for the need for women's shelters on reserve so that women are not forced to seek shelter off reserve. This is one matter that needs the speedy attention of policy-makers.

Another issue worthy of exploration is Certificates of Possession and their distribution on reserves. This system needs careful re-evaluation through the lens of gender equality. The existing distribution apparently favours men, as they are the majority of holders, but perhaps First Nation government and Ottawa need to sit together and come up with a system wherein more women are protected through the existing Certificates of Possession.



Conclusion

The issue of matrimonial property rights for on-reserve indigenous women is complex and highly important. The legislative gap will ensure the problem continues unaddressed. Even if bands enact rules, the lack of legislative power for First Nations to enforce rules governing equal division of assets at time of marital or relationship breakdown makes the situation more tenuous.

Bill S-4 is not a perfect bill. No bill ever is. It allows self-governing First Nation communities to address fundamental justice requirements of providing equal rules for women in marital breakdown situations. There is ample consensus. Fundamental justice, the Charter, many national and international studies say something must be done to protect women. First Nations should accept Bill S-4, as it provides interim federal rules until indigenous communities adopt their own. This is not a surrender in the struggle for self-government, it is only a recognition that fundamental justice must be served, as women cannot wait until every band establishes equal rules in these cases. If interim federal rules were rejected, it would be justice denied to far too many women. If anything, this bill creates the necessary jurisdiction and obligates all bands to establish relatively uniform rules. Our surveys found that a strong majority of respondents (77 per cent) across three Prairie provinces (albeit not from every band) supports equal division of assets on reserve in case of marital breakdown. First Nation people want these rules. It is not entirely clear why Aboriginal organizations and leaders continue to play politics with this critical issue. Our respondents also find a troubling trend where strong majorities within these communities think

women are not protected from violence and are not involved in community decision-making. This underscores the reasons this kind of legislation is needed immediately.

The author of this report thinks for all the above reasons that, as a preliminary measure, First Nations should stand behind Bill S-4 as a means to achieve both self-government and fundamental justice. Bill S-4, like other reasonable reform measures such as the *First Nation Governance Act*, is merely a statute that creates justice now and can be changed as self-government is achieved.

The author also thinks indigenous communities should consider the *First Nations Land Management Act*, as it obligates them to create rules on land and property in case of marriage breakdown. At the same time, it reduces regulatory burdens on First Nation economies by cutting out Indian Affairs, and it has been shown to improve the economic climate of reserves under its provisions.

At the same time, while bands should not use housing issues and the lack of shelters on reserve as reasons to oppose Bill S-4, these problems need to be corrected immediately. Moreover, the fact that many men have a CP for the marital home should be seen as a call for reforming that system to ensure women are better protected by these property rights instruments.

In the end, remedies are available if First Nations realize that achieving fundamental justice in their communities never has to come at the expense of self-government or jurisdiction. In fact, achieving justice for all its citizens is the first step on the road toward responsible autonomy.

Endnotes

1. In the 1986 *Derrickson v. Derrickson* ruling, Ms Derrickson sought a division of family assets pursuant to the *Family Relations Act* of British Columbia. The property, however, was registered to her husband as a Certificate of Possession on Westbank First Nation. The Provincial Court in B.C. found that provincial law could not be used to distribute the land within the reserve. The Court found that provincial laws could not apply on lands reserved for federal jurisdiction.
2. Phone conversation with Margot Geduld, spokesperson for Indian and Northern Affairs Canada, November 3, 2010.
3. First Nation groups who advocate for self-government tend to argue that the right of self-government is an inherent right for all First Nations and is not delegated from other levels of government.
4. The Assembly of First Nations, the Native Women's Association of Canada and other organizations opposed the legislation, although the urban-focused Congress of Aboriginal Peoples supported it as a progressive move.
5. Applications for CPs go the local band council first and a band council resolution (a bylaw passed by council) is drafted and sent to the Minister of Indian Affairs for approval. The Minister either accepts or rejects applications. Once one obtains a CP, the land is set aside for the holder, who may then develop it, lease it to non-members or sell it to another band member.
6. Over the decades, Statistics Canada has been collecting data that measures violence against all women. In particular, they have found that indigenous women, especially on reserve, are much more likely to experience violence at the hands of their partner than are non-Aboriginal women. Available online at <http://www.statcan.gc.ca/pub/85-570-x/2006001/figures/4054065-eng.htm> (Accessed November 5, 2010).
7. Dictionary.com definition available online at <http://dictionary.reference.com/browse/representative+democracy> (Accessed December 3, 2010).
8. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).
9. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Advance Edited Version, E/CN.4/2005/88/Add.3, 2 December 2004 at paragraph 112.
10. Jordan's Principle involves a young boy from a Northern Manitoba First Nation with a rare muscular disorder who spent two unnecessary years in a hospital while different levels of government argued over who was responsible for his medical care. He died in 2005. This led to the unanimous passage of the *Jordan's Principle Implementation Act* in the House of Commons in 2007. It calls on bureaucracy to transcend jurisdictional squabbles and provide care in situations where the health of a child is in the balance. *Jordan's Principle Implementation Act* is available online at <http://web2.gov.mb.ca/bills/39-3/b203e.php> (Accessed December 3, 2010).
11. Ibid. Statistics Canada data on Aboriginal violence against women. Available online at <http://www.statcan.gc.ca/pub/85-570-x/2006001/figures/4054065-eng.htm>.
12. Robert Foot, *Postmedia News*, "First Nations Blame Ottawa for Continued Poverty on Reserve," October 15, 2010. Available online at <http://www.globalsaskatoon.com/First+Nations+blame+Ottawa+continued+poverty+reserves/3678297/story.html> (Accessed November 5, 2010).
13. Ibid.
14. Ibid.
15. The First Nations Property Ownership Initiative is a measure spearheaded by B.C. First Nation leader Manny Jules to allow First Nations to voluntarily regain title to their reserve lands and, if they choose, grant parcels of that land to individuals in fee simple, which they can transfer to whomever they wish. The move involves a legal framework and has been found to be both legally and constitutionally sound.
16. Tom Flanagan, Christopher Alcantara and Andre Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (McGill-Queen's University Press, 2010)

Further Reading

June 2010

Fourth Annual Aboriginal Governance Index

Joseph Quesnel

<http://www.fcpp.org/publication.php/3332>

April 2010

Australia and Canada's Indigenous People: Parallels in Dysfunction

Tahlia Maslin

<http://www.fcpp.org/publication.php/3269>

March 2010

Where's Aboriginal Leadership on Human Rights?

Joseph Quesnel

<http://www.fcpp.org/publication.php/3208>

October 2008

Ask Not What your Country Can do for You

Joseph Quesnel

<http://www.fcpp.org/publication.php/2417>

For more see
www.fcpp.org