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ARTICLE

Matrimonial Property Rights on Indian Reserves and Māori Land: A Comparative Study

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In both Canada and New Zealand, there is a lack of legislation governing the division of relationship property on Indian reserve land and Māori land. This article explains the causes of these legislative holes and explores the effects of this situation in both jurisdictions. Further, it examines the Canadian Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act, and addresses whether the changes proposed by the Bill S-2 could be used as a template for future legislation in New Zealand. Bill S-2 is an exciting step towards plugging these legislative gaps in Canada. The Bill not only allows for indigenous self-determination through the enactment of community-approved laws, but further provides legislative protection for the rights of those living on indigenous lands. It is clear that New Zealand can learn much from this Bill and, in its growing acceptance of the role of self-determination, should look to Canada's example which ensures basic democratic processes and rights protections.

I Introduction

In both Canada and New Zealand, there is a lack of legislation governing the division of relationship property on Indian reserve land and Māori land. This article intends to explain the causes of these legislative holes, as well as explore the effects of this situation in both jurisdictions. Further, it will examine the proposed Canadian Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act, and the possible implications in Canada

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of this proposed legislation. Finally, it will address whether the proposed changes in Bill S-2 could be used as a template for future legislation in New Zealand, with particular reference to the ongoing role of indigenous self-determination.

II Defining Indian Reserve and Māori Land

Before analysing the legislative holes surrounding the division of property on Indian reserve land and Māori land, it is important to determine what constitutes such "reserve" land and "Māori land". Under the Indian Act RSC 1985 c I-5, "reserve" land is a "tract of land" which has been set aside for "use and benefit in common"[1] by an Indian band. An Indian "band" is a "body of Indians" who share territory and culture, and are deemed to be a band by the Governor in Council.[2] The legal title to the reserve land vests in the Crown,[3] but the band may allot segments of the land to individual band members for personal use.[4] The allocation must be approved by the Minister of Indian Affairs and Northern Development; once approved, the member is awarded a Certificate of Possession.[5] There are currently 3,385,950 hectares of land area registered as "reserve land" in Canada.[6]

The status of land in New Zealand is defined under the Te Ture Whenua Maori Act 1993.[7] Māori land includes both Māori customary land and Māori freehold land,[8] which are defined in pt 6. Māori customary land is land held by Māori "in accordance with tikanga Maori",[9] which is defined as "Maori customary values and practices".[10] Māori freehold land is any land deemed by a "freehold order" made by the Māori Land Court to be beneficially owned.[11] As of September 2009, Māori land comprised approximately five per cent of the total land mass in New Zealand.[12]

Issues arise when, at the demise of a relationship, relationship property is positioned on an Indian reserve or Māori land. In Canada, relationship property can include "homes and the land they sit on and other property used for a family purpose".[13] The New Zealand Property (Relationships) Act 1976 defines relationship property to include the "family home" and "family chattels".[14] A relationship collapse can be emotionally traumatic for all persons involved, and the painful process of asset division frequently causes relations between the parties to become strained. In both New Zealand and Canada, legislative

1 Indian Act RSC 1985 c I-5 , s 2(1), definition of "reserve".
2 Section 2(1), definition of "band".
3 Section 2(1), definition of "reserve", para (a).
4 Section 20(1).
5 Section 20.
6 "Land Base Statistics" (11 February 2013) Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca>.
7 Te Ture Whenua Maori Act 1993, s 129.
8 Section 4.
9 Section 129(2)(a).
10 Section 4.
11 Section 129(2)(b).
12 PJ Savage "Reflections after nearly 20 years as a Māori Land Court" (November 2013) Māori Land Court: Judge's Corner <www.maorilandcourt.govt.nz>.
13 Wendy Grant-John *Report of the Ministerial Representative Matrimonial Real Property Issues on Reserves* (Office of the Ministerial Representative, 9 March 2007) at [53].
14 Property (Relationships) Act 1976, s 8(1)(a)–(b).

protection exists to ensure that the relationship property is divided equally between the spouses.[15] Such protection does not, however, extend to those living on Indian reserves or Māori land.

III The Lack of Legislation Governing Division of Relationship Property on Reserve Land

A *Canada's legislative framework*

This lack of protection for couples living on Indian reserves is caused, in part, by Canada's legislative framework. The Constitution of Canada is the supreme law of Canada, and any law deemed inconsistent with the Constitution is invalid "to the extent of the inconsistency".[16] Two levels of government exist beneath the Constitution: the federal government, which creates Federal law applicable to the whole of Canada, and the provincial or territorial governments, which create law particular to individual Canadian states.[17] The Constitution Act 1867 awards the federal government legislative authority over matters concerning "Indians and Lands reserved for the Indians" to the Parliament of Canada,[18] while placing the "Property and Civil Rights in the Province" under the jurisdiction of each provincial government.[19] Therefore, while provincial governments have legislative authority over provincial property rights, if such property-related legislation encroaches or conflicts with any federal jurisdiction over land reserved for Indians, it will be declared unconstitutional and thus inoperative to the extent of the inconsistency.

B *The leading authorities*

Such a declaration of inoperability occurred in *Derrickson v Derrickson*.[20] Mrs Derrickson claimed under pt 3 of the provincial Family Relations Act[21] that she was entitled to a one-half interest in properties situated on an Indian reserve for which her husband held Certificates of Possession.[22] Chouinard J concluded that, as pt 3 of the provincial Family Relations Act provided for the equal division of property between spouses, it encroached on the right to possession of land on an Indian reserve [23] which is "manifestly of the very essence of the federal exclusive legislative power under s 91(24) of the Constitution Act, 1867".[24] Awarding Mrs Derrickson a one-half interest in the Indian reserve land would infringe on her husband's right to possession of that reserve land and, as such, was outside the jurisdiction of the provincial courts. *Derrickson* therefore establishes that

15 In New Zealand, this is provided for in the Property (Relationships) Act, s 11. In Canada, different states have enacted their own legislation; for example, in British Columbia the Family Law Act 2011 (SBC), s 81 governs property division.
16 Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 52(1).
17 The Supreme Court of Canada "About the Court" (2012) <www.scc-csc.gc.ca>.
18 Constitution Act 1867 30 & 31 Victoria c 3 (UK), s 91(24).
19 Section 92(13).
20 *Derrickson v Derrickson* [1986] 1 SCR 285.
21 Family Relations Act RSBC 1996 c 128. This has subsequently been replaced by the Family Law Act SBC 2011 c 25.
22 Pursuant to Indian Act, s 20.
23 At 294.
24 At 296.

provincial law entitling a partner to an undivided half interest in family assets is inapplicable on family reserves.[25]

The inapplicability of provincial family law on reserve land was further extended in *Paul v Paul*.[26] The Supreme Court overturned an order granting Mrs Paul interim occupation[27] of a reserve-based matrimonial home, for which Mr Paul held a Certificate of Possession. Agreeing with Seaton JA in the Court of Appeal that "occupation is part of possession",[28] the Court found that granting an order entitling Mrs Paul to temporary occupation of the house encroached on the possession rights which fell under federal jurisdiction.

Derrickson does, however, make provision for a compensation order in lieu of division of the matrimonial house. Such a compensation order takes into account the value of the undivided land for the "purpose of adjusting the division of family assets between the spouses under the relevant provincial law".[29] However, other than compensation in lieu of division, the courts are unable to apply provincial laws of equal division to matrimonial homes on reserve land. Therefore, a spouse who is not named on the Certificate of Possession cannot share in the interest in that reserve land, or to the house positioned on that land. Even when both parties are jointly named on the Certificate of Possession, if there is a disagreement over who should stay in the home, a judge has no authority to make a final decision.[30] The Courts can provide no recourse when parties contest the possession of reserve land.

C *A lack of Federal legislation: The Indian Act*

Furthermore, no recourse is available through federal legislation. While the federal government has the authority to legislate in regards to Indian land, no federal law governing matrimonial property has been enacted. The federal Indian Act dictates the rules of ownership of reserve lands, but makes no mention of the land's division upon the breakdown of a relationship. Such a lack of federal legislation, alongside the inapplicability of provincial enactments, has led to the legislative hole regarding the division of relationship property on Indian reserve land.

IV The Lack of Legislation Governing Division of Property on Māori Land

A *The statutory situation*

In New Zealand, the division of property is governed by the Property (Relationships) Act 1976. Under s 11, "each of the spouses or partners is entitled to share equally" in the family home, family chattels, and other relationship property. However, Māori land is excluded from the ambit of the Property (Relationships) Act under s 6, which states that "nothing in this Act shall apply in respect of any Maori land". Therefore, Māori customary and freehold land is not subject to the equal division rules articulated in s 11. Consequently, when a

25 In making this decision, Chouinard J stated that he was "not unmindful of the ensuing consequences for the spouses, arising out of the laws in question, according as real property is located on a reserve or not". *Derrickson v Derrickson*, above n 20, at 303.

26 *Paul v Paul* [1986] 1 SCR 306.

27 Family Relations Act, s 77.

28 *Paul v Paul*, above n 26, at 311.

29 1 November 2012 146 HCD 11774.

30 At 11768 and 11784.

relationship breaks down, the beneficial interest of the party who does not hold customary or freehold title in the Māori land is not protected, as it is not subject to equal sharing. If the spouse with the interest in the Māori land dies, however, the remaining partner may be entitled to a beneficial life interest in the land.[31]

B *The leading authorities*

The Family Court case of *Rawhiti v Marama* affirms that s 6 of the Property (Relationships) Act 1976 is designed to exempt Māori land from equal division.[32] Further, the Court in *Marama* deemed that the matrimonial "dwellinghouse", which was situated on Māori land, was part of that land.[33] The parties' matrimonial home, as Māori land, was therefore not subject to equal division under s 11.

More recently, the courts have adopted a novel approach to the division of matrimonial property on Māori land. In the 2010 case *TG v RL*, the Family Court established that a family home could not be excluded under s 6 of the Property (Relationships) Act as Māori land, unless it was deemed "part and parcel" of that land.[34] The test for whether a chattel has become "part and parcel" of the land is determined both by the degree to which the chattel is annexed to the land and the purpose of such annexation.[35] In *TG v RL* the dwelling sat on "timber piles",[36] rested on the land by its own weight, and was not intended to become a fixture attached to the land.[37] It was thus deemed to be a chattel, rather than part of the Māori land, under the Property (Relationships) Act. Under s 11, the house was therefore subject to equal division.[38]

Furthermore, *Shirtliff v Albert* suggests that if Māori land is removed from the pool of relationship property, the remaining matrimonial property should be divided unequally to redress this imbalance.[39] Section 11B(2) of the Property (Relationships) Act provides for this, enabling the court to award each partner "an equal share in such part of the relationship property as it thinks just in order to compensate for the absence of an interest in the family home". Therefore, even if the matrimonial home was appropriately affixed to the land (so as to become part and parcel of it), the removal of this home from the pool of relationship property could be redressed through a s 11B(2) adjustment.

V What Are the Results of these Legislative Gaps?

A *The effect of the legislative gap in Canada*

While the rates of marital breakdown on Indian reserves are "comparable to the off-reserve population",[40] the typical impact of such a breakdown is vastly more damaging to

31 Te Ture Whenua Maori Act, s 99(2).
32 *Rawhiti v Marama* (1983) 2 NZFLR 127.
33 At 127.
34 *TG v RL [Maori land: removable home]* [2010] NZFLR 135 at [10].
35 This test was first expressed in *Holland v Hodgson* (1872) LR 7 CP 328 at 355.
36 *TG v RL*, above n 34, at [13].
37 At [8]. Clause 8.1 of the site licence agreement stated "[a]ll parties to this deed agree that ... the house remains a chattel and does not become a fixture attached to the land."
38 Section 11(1)(b).
39 *Shirtliff v Albert* [2011] NZFLR 971 at [11].
40 Wendy Grant-John *Report of the Ministerial Representative Matrimonial Real Property Issues on Reserves* (9 March 2007) at 2.

those seeking divorce and division of on-reserve matrimonial property. The lack of legislation governing division of matrimonial property on reserve land causes this damage. As the party who does not hold a Certificate of Possession for the reserve land does not acquire a one-half interest in the land at separation, the certificate-holding partner is free to "sell an on-reserve home and keep all of the money" or "bar the other from the on-reserve home".[41] The trauma of losing a home in this manner is compounded by extreme housing shortages on reserves, which may force an alienated partner off the reserve or even result in homelessness. In 2008, Aboriginal people represented just 2.5 per cent of Calgary's total population, yet comprised 36 per cent of Calgary's overall homeless population.[42] Aboriginal homelessness may be caused, in part, by the lack of protection of the non-Certificate of Possession holder's interest in the matrimonial home.

Indigenous women are disproportionately affected by the lack of such protection because women typically do not hold Certificates of Possession for reserve land. While there is no "prohibition against women owning property through a certificate of possession",[43] there exists a perception, built upon a "cumulative effect of a history of legislation that has excluded women", that women are not entitled to own such a Certificate.[44] Without a Certificate, a woman acquires no interest in the matrimonial home at the end of a relationship. Moreover, "the courts cannot order an abusive spouse to leave the matrimonial home if the Certificate of Possession is in the abusive spouse's name".[45] Provincial protection orders cannot be enforced on reserve land as they interfere with the Certificate-holder's right to possession of Indian land, which falls under federal jurisdiction. Women are forced to leave their homes when "fleeing domestic violence", only to return to the "abusive relationship due to a lack of housing options".[46] Aboriginal women are five times more likely to be murdered than non-Aboriginal women in Canada.[47] This may be partly because these women, typically without Certificates of Possession and thus with no interest in the family home, are left with nowhere to go when faced with an abusive partner.

When women flee in such circumstances, they typically take with them any children of the relationship. This removal from their home, and frequently their communities, causes suffering to both mother and child, who are separated from the kinship groups within their band.[48] Furthermore, while the Government of Canada provides indigenous peoples with community-based services such as Maternal Child Care, Children's Oral Health, and educational support, these and other similar services are "administered almost

41 1 November 2012 146 HCD 11768.

42 Yale D Belanger, Gabrielle Weasel Head, Olu Awosoga *Assessing Urban Aboriginal Housing and Homelessness in Canada: Final report prepared for the National Association of Friendship Centres (NAFC) and the Office of the Federal Interlocutor for Métis and Non-Status Indians (OFI)* (30 March 2012) at 30.

43 Katrina Harry *The Indian Act & Aboriginal Women's Empowerment – What Front Line Workers Need to Know* (Battered Women's Support Services, January 2009) at 19.

44 Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (Record 19104, 1997) as cited in Harry, above n 43, at 19.

45 Minister of Indian Affairs and Northern Development *After marriage breakdown: Information on the on-reserve matrimonial home* (2003) at 7.

46 Indian and Northern Affairs Canada *Consultation Report on Matrimonial Real Property* (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, 7 March 2007) at 7. In this report, 73 per cent of the participants were Indigenous women, who shared their perspectives on the issue of matrimonial real property.

47 1 November 2012 146 HCD 1015.

48 Indian and Northern Affairs Canada, above n 46, at 8.

exclusively by the bands".[49] Few programmes exist for Indians who are not living on reserves.[50] Leaving the Indian band means the loss of governmental services and financial support, which may be crucial to the child's educational and health needs.

B *The effect of the legislative gap in New Zealand*

In New Zealand, "very few Māori now live on Māori freehold land".[51] The number of people personally affected by the gap in legislature governing the division of property on Māori land is therefore small in comparison to Canada.[52] Furthermore, protection orders under pt 2 of the Domestic Violence Act 1995, which compel the immediate removal of a violent spouse from their home, are enforceable on Māori land, regardless of which partner owns the interest in the land.

While protection orders are enforceable on Māori land, the unequal share in interest in this land may create violence-inducing power imbalances in relationships. In a relationship, each party provides a "power base" or their "personal resources" which are "used to meet each other's needs".[53] The family home and land constitutes such a personal resource. Because whichever party holds the greater power base in the relationship has the greater power, this may contribute to the the spouse with the interest in the land asserting authority over the spouse without this interest. In turn, this may lead to domestic violence. New Zealand has 80,000 domestic violence cases each year.[54] The power imbalances caused by the legislative gap may contribute to this staggeringly high figure.

VI A Changing Situation: Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act

The Federal Conservative Government of Canada introduced a Bill in 2008 in an attempt to provide legislation to govern the division of reserve property.[55] On 11 June 2013 the latest version of this Bill, named Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act, passed its third reading in the House of Commons.[56] Although the Bill still awaits Senate approval and Royal assent before it can become law, approval of the House of Commons is nonetheless a major step towards plugging the legislative gap regarding matrimonial interests in reserve land.[57]

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49 Harry, above n 43, at 15.

50 At 15.

51 Savage, above n 12.

52 This issue has been litigated in only four instances: *TG v RL*, above n 34; *Rawhiti v Marama*, above n 32; *Baker v Baker* HC Palmerston North AP 14/93, 10 September 1993; and *Shirtliff v Albert*, above n 39.

53 Neena M Malik and Kristin M Lindahl "Aggression and Dominance: The Roles of Power and Culture in Domestic Violence" (1998) 5 Clinical Psychology: Science and Practice 409 at 411.

54 Peter Boshier and Jennifer Wademan "Domestic Violence and the Impact on Children's Lives" (paper presented to the Sixth World Congress on Family Law and Children's Rights, Sydney, 18–20 March 2013) at 1.

55 Jillian Taylor "First Nations matrimonial property bill met with mixed reactions" (12 June 2013) CBC News <www.cbc.ca>.

56 Taylor, above n 55.

57 On 19 June 2013, shortly after this article was written, Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act (2011) received Royal Assent and is now law. First Nations can now establish their own community-specific matrimonial real property laws, which will be

Bill S-2 has two main objectives. First, cl 7(1) empowers First Nations to enact their own community-specific matrimonial real property laws, which provincial courts can then apply.[58] The Council of each First Nations Community must propose their suggested laws to the Community to vote on. These suggested laws are approved if at least 25 per cent of eligible voters in the band vote, and these voters approve them.[59] Bill S-2 therefore enables First Nations communities to establish laws specific to their unique culture and traditions, and the community voting process ensures that these laws are in accordance with the community's interests.

The Bill's second purpose is to establish a set of interim rules, called Provisional Federal Rules,[60] which provide matrimonial real property rights and protections for residents living on reserves until a First Nation does develop and enact its own laws.[61] Such protections afford couples living on-reserve the same relationship property rights and protections as couples living off-reserve. For example, under the new Bill, cl 16(1) enables a judge to make an emergency protection order and grant the applicant exclusive occupation of the family home even if the applicant does not hold a Certificate of Possession for the land.[62] This would give a partner facing domestic violence the means to escape abuse without having to abandon the reserve or face homelessness.

Despite the advantages of the Bill, it has not been universally well-received. The Liberal Government of Canada has criticised the Bill as being paternalistic, claiming the Aboriginal Affairs Committee was not adequately consulted in its creation.[63] Chief Garrison Settee of the Cross Lake First Nation further described the Bill as "redundant" as indigenous peoples "know how to govern [them]selves".[64]

The Liberal Government of Canada therefore proposes making better use of existing provisions for self-determination under the First Nations Land Management Act SC 1999 c 24. This Act is a self-government agreement and provides a limited number of First Nations Communities with the "opportunity to take responsibility for the management of their reserve lands".[65] Such management includes rules and procedures governing matrimonial real property, which must be created in consultation with its members.[66] But this argument is flawed; only a limited number of communities can partake in this self-government exercise, leaving the remainder of First Nations communities without legislation governing the division of matrimonial property. Moreover, the Provisional Federal Rules provided for in Bill S-2 protect matrimonial rights while First Nations create their own culturally relevant laws. These indigenous laws will diminish "the role of the

applied by provincial courts. From 16 December 2014, Provisional Federal Rules will apply to First Nations who have not enacted such matrimonial property laws. See "Backgrounder - *Family Homes on Reserves and Matrimonial Interests or Rights Act*" (19 June 2013) Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca>.

58 Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act 2013 c 20 at cl 7(1).

59 At cls 8–9.

60 At cl 4.

61 At cls 13–52.

62 At cl 16(1).

63 (1 November 2012) 146 HCD 11772. Insufficient consultation might amount to a breach of the duty to consult, as articulated in *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 79, [2004] 3 SCR 511 at [36]–[37].

64 Taylor, above n 55.

65 Minister of Indian Affairs and Northern Development, above n 45, at 3.

66 At 3.

federal government in the day-to-day administration of first nations".[67] Bill S-2, therefore, arguably promotes First Nations' self-determination.

VII The Case for Self-Determination: Could Bill S-2 Provide a Template for Legislative Change in New Zealand?

If the New Zealand Parliament enacted legislation providing for the division of Māori land, it is possible it would follow the Canadian example of providing for indigenous self-determination. Self-determination has its benefits. It "enable[s] the preservation of indigenous cultures" and helps to "[rectify] the … historical injustices of loss of self-government"[68] by specifically allowing for such self-rule. Furthermore, there has been a recent push towards Māori self-determination, and in the Te Urewera National Park settlement, Tūhoe self-determination within its remote territory was agreed upon.[69] This may be the start of the acquisition of greater self-determination for Māori.[70]

New Zealand may learn from Canada's example of implementing mechanisms for indigenous self-determination. The Canadian situation serves to highlight that self-determination must be supported by basic democratic principles, and basic protections. The gender-biased awarding of Certificates of Possession for reserve land demonstrates that without guidelines in place to ensure all community members' views are heard, subordinate groups can become marginalised within their own territories. The high prevalence of domestic abuse and homelessness on reserves shows that it is important to afford legislative protection to all members of society, regardless of where they reside. It is not enough simply to enact self-determination mechanisms as in the First Nations Land Management Act. There must also be some safeguards in place to ensure both that subsequent community laws are enacted in the best interests of all of their members, and to guarantee the protection of all members' rights. It is hoped that the Canadian Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act will achieve both of these aims.

VIII Conclusion

The division of relationship property at the end of a relationship can be a traumatic experience for all parties involved. For those couples living on reserve land or Māori land, however, this trauma is exacerbated by the lack of existing legislation to protect their interests in such land. This lack of protection is caused by legislative frameworks, failure to legislate within these frameworks and subsequent case law. This has led to many

67 (1 November 2012) 146 HCD 11770.

68 Lindsey Te Ata o Tu MacDonald "Self-determination and the politics of indigeneity" (2006) 1 MAI Review at 1.

69 Editorial "Settlement with Tuhoe good for NZ" *The New Zealand Herald* (online ed, Auckland, 10 June 2013).

70 The 2013 review of the Te Ture Whenua Maori Act 1993 supports this trend towards self-determination. The fourth proposal in the discussion document suggests that "there should be an enabling institutional framework to support owners of Māori land to make decisions and resolve any disputes". Such an institutional framework aims to empower Māori landowners by giving them decision-making authority about the use and management of their land. See Ministry of Maori Affairs *Discussion Document: Te Ture Whenua Māori Act 1993 Review Panel* (March 2013) at 31.

problems—in particular, Aboriginal homelessness and domestic violence. The new Canadian Bill S-2 Family Homes on Reserves and Matrimonial Interests or Rights Act is an exciting step forward in plugging these legislative gaps. The Bill not only allows for indigenous self-determination through the enactment of community-approved laws, but further provides legislative protection for the rights of those living on indigenous lands. It is clear that New Zealand can learn much from this example and, in its growing acceptance of the role of self-determination, should look to Canada's example which ensures basic democratic processes and rights protections.