HOUSE OF COMMONS
CANADA

WALKING ARM-IN-ARM TO RESOLVE THE ISSUE OF ON-RESERVE MATRIMONIAL REAL PROPERTY

Report of the Standing Committee on Aboriginal Affairs and Northern Development

Nancy Karetak-Lindell, M.P.
Chair

June 2005

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FOREWORD

I am very honoured to present the Standing Committee on Aboriginal Affairs and Northern Development's Fifth Report, entitled *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*. This important initiative was undertaken at the request of the Minister of Indian Affairs and Northern Development, Andy Scott. The Committee heard from a wide variety of witnesses who presented valid points of view and suggested directions they wished taken. We were enriched by their contributions and I thank them for the knowledge and assistance.

I am also encouraged by the Aboriginal Retreat held May 31st, 2005 with the Prime Minister of Canada, Paul Martin, the Cabinet Committee on Aboriginal Affairs and the five National Aboriginal Organizations. The Political Accords signed by the NAO leaders and the Minister of Indian Affairs and Northern Development will chart a new direction in the important relationships between Canada and the First Peoples of this great country. I believe this development will make it more possible to move on this important file of on-reserve matrimonial real property and come to a resolution that will help the First Nations affected by the current gap in the legislative options, especially women and children.

I want to thank all the people who have helped us with this study, especially the members, clerk and analysts of our committee.

Nancy Karetak-Lindell, M.P.
Chair

THE STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

has the honour to present its

FIFTH REPORT

Pursuant to Standing Order 108(2), the Committee has undertaken a study of on-reserve matrimonial real property. After hearing evidence, the Committee agreed to report to the House as follows:

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INTRODUCTION

By letter dated 2 December 2004, Hon. Andy Scott, Minister of Indian Affairs and Northern Development, requested that the House of Commons Standing Committee on Aboriginal Affairs and Northern Development advise the Minister "as to how the federal Crown can best address the longstanding issue of on-reserve matrimonial real property."

At the outset, this committee recognized the importance of this issue to individuals, in particular First Nations women and children, who reside on reserves. At the same time, this Committee recognized that the issue was extremely complex, and as the Committee hearings progressed, became aware that any recommendations it would propose would require the balancing of a number of seemingly competing interests. The Committee also realized it was imperative that all recommendations be consistent with the government's recognition of the inherent right of self-government by recognizing First Nations' authority over on-reserve matrimonial real property, and that while immediate action was required, any action needed to be taken in consultation and collaboration with First Nations.

In most of Canada, upon the breakdown of marriage, or in some cases, upon the breakdown of a common-law relationship, provincial or territorial law governs how assets of the marriage or common-law relationship are to be divided. Assets include personal property (furniture, vehicles, and other objects) as well as real property (land or things attached to land). Provincial or territorial legislation provides that, with some exceptions, assets are to be divided equally between both spouses. Such legislation is commonly referred to as matrimonial property law.

It is as a result of the distribution of powers under the *Constitution Act, 1867* that provincial or territorial legislation, and not federal legislation, governs the division of property upon marriage or relationship breakdown. Section 92 of that Act lists the areas over which each province has exclusive jurisdiction, and subsection 92(13) provides that provinces have exclusive jurisdiction to make laws relating to property and civil rights in the province.

However, subsection 91(24) of the *Constitution Act, 1867* gives Parliament exclusive law-making authority over "Indians, and Lands reserved for the Indians." This has meant that provincial and territorial matrimonial property laws do not apply

to real property on reserve lands,[1] an interpretation that has been confirmed by the Supreme Court of Canada in the cases of *Derrickson* v. *Derrickson*[2] and *Paul* v. *Paul*[3]. Since there are no federal provisions in the *Indian Act* or elsewhere that govern the division of matrimonial real property on reserves, a legislative gap has been identified. Consequently, individuals on reserves do not have access to the Canadian legal system to resolve issues relating to the division of real property on the breakdown of a marriage or common-law relationship.

This legislative gap has been raised both domestically and internationally by First Nations women and by organizations such as the Native Women's Association of Canada. It has also been the subject of discussion papers and reports commissioned by the Department of Indian Affairs and Northern Development, and has been studied by the Standing Senate Committee on Human Rights.

This committee heard from a variety of witnesses including First Nations organizations, family law practitioners, legal experts, and departmental officials. In addition to putting forward a number of creative recommendations, these witnesses highlighted some of the issues that the Committee needed to be aware of in approaching the issue of on-reserve matrimonial real property.

The Committee notes that, due to scheduling, some of the issues that they had wished to examine were not dealt with in a satisfactory manner, and some of the witnesses that they had wished to hear from were not able to appear. In particular, the Committee heard little evidence relating to First Nations that use custom systems of land allotment, as opposed to allocating land under the land provisions of the *Indian Act.* As a result, the Committee has no information at this time as to how any legislative regime created by the federal government in consultation with First Nations will be received by or affect those who use custom allotment systems.

PREVIOUS EXAMINATION OF THE ISSUE

A number of references and recommendations have been made with respect to the on-reserve matrimonial real property issue in both domestic and international reports.[4]

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1 Matrimonial property laws do, however, govern the division of personal property on reserves.

2 [1986] 1 S.C.R. 285.

3 [1986] 1 S.C.R. 306.

4 Please see Appendix A for a complete list of reports that have referred to the on-reserve matrimonial real property issue.

1. SELECTED DOMESTIC REPORTS AND STUDIES

A. THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA

The Aboriginal Justice Inquiry was created by the Government of Manitoba in 1988. Its review included all components of the provincial justice system, and the final report included a chapter on Aboriginal women. With respect to matrimonial real property, the report noted that:

> 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.
>
> We recommend that:
>
> The *Indian Act* be amended to provide for the equal division of property upon marriage breakdown.[5]

B. THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

In Volume III, *Gathering Strength*, of the *Report of the Royal Commission on Aboriginal Peoples*, the Commission reviewed the decisions in *Paul* v. *Paul* and *Derrickson* v. *Derrickson*. Its recommendations with respect to the on-reserve matrimonial real property issue were consistent with its recognition of the inherent right of self-government:

> **Recommendations**
>
> The Commission recommends that
>
> 3.2.10
>
> Federal, provincial and territorial governments promptly acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements.
>
> …
>
> 3.2.12

[5] *Report of the Aboriginal Justice Inquiry of Manitoba,* Chapter 13: Aboriginal Women, online: http://www.ajic.mb.ca/volumel/chapter13.html

Aboriginal nations or organizations consult with federal, provincial and territorial governments on areas of family law with a view to

(a) making possible legislative amendments to resolve anomalies in the application of family law to Aboriginal people and to fill current gaps;

(b) working out appropriate mechanisms of transition to Aboriginal control under self-government; and

(c) settling issues of mutual interest on the recognition and enforcement of the decisions of their respective adjudicative bodies.

3.2.13

With a view to self-starting initiatives in the family law area or to self-government, Aboriginal nations or communities establish committees, with women as full participants, to study issues such as

(a) the interests of family members in family assets;

(b) the division of family assets on marriage breakdown;

(c) factors to be considered in relation to the best interests of the child, as the principle is applicable to Aboriginal custody and adoption;

(d) rights of inheritance pertaining to wills, estates or intestacy; and

(e) obligations of spousal and child support.

C. THE STANDING SENATE COMMITTEE ON HUMAN RIGHTS

From June to October 2003, the Standing Senate Committee on Human Rights held hearings on the issue of on-reserve matrimonial real property. It released its interim report, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*, in November 2003. That interim report contained the following preliminary recommendations:[6]

- Amend the *Indian Act* so that provincial/territorial laws with respect to the division of both personal and real matrimonial property can apply on reserves;

- Amendments to the *Indian Act* should recognize that some First Nation communities have measures in place with respect to matrimonial real property; such measures should continue provided that they afford protection at least equivalent to that of provincial legislation;

[6] Please see Appendix B for a complete list of the Standing Senate Committee's recommendations.

- Amendments to the *Indian Act* should take into account the rights of children;

- The issue of on-reserve matrimonial real property should be specifically addressed in any self-government negotiations;

- Appropriate funding should be given to First Nations women's associations so that they can undertake thorough consultations with First Nations women on the issue of division of matrimonial property on reserves.

The Senate Committee was unable to continue its study due to the dissolution of Parliament at the call of the June 2004 federal election.

In November 2004, the Minister of Indian Affairs and Northern Development, Hon. Andy Scott, was invited to appear before the Senate Committee to respond to the recommendations contained in its November 2003 interim report. It was at that meeting that the Minister advised the Committee that he agreed with the need for a legislative solution, and would be referring the issue to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, with the request that that Committee confer with stakeholders and produce a report.

Following Minister Scott's appearance, the Senate Committee prepared a second interim report that acknowledged its continued interest in the topic and stressed the need for immediate action.

2. INTERNATIONAL COMMENTARY

The United Nations Committee on Economic, Social and Cultural Rights articulated a number of concerns relating to Aboriginal peoples in its response to Canada's third periodic report on the rights covered by articles 1 to 15 of the *International Covenant on Economic, Social and Cultural Rights*. With respect to the issue of on-reserve matrimonial real property, the Committee noted that:

> … Aboriginal women living on reserves do not enjoy the same rights as women living off reserves to an equal share of matrimonial property at the time of marriage breakdown.[7]

The Committee called upon Canada to address the situation in consultation with the communities concerned "with a view to ensuring full respect for human rights."

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[7] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98*, E/C.12/1/Add.31., 10 December 1998, at para 29, online: http://www.unhchr.ch/tbs/doc.nsf/0/c25e96da11e56431802566d5004ec8ef?Opendocument

The December 2004 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* noted that First Nations women continue to be unfairly affected with respect to matrimonial real property on reserves, and that legal reforms are required:

> … the Government [should] address with high priority the lack of legislative protection regarding on-reserve Matrimonial Real Property which places First Nations women living on reserves at a disadvantage. [8]

STANDING COMMITTEE ON ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT'S HEARINGS

A total of 31 witnesses appeared before this committee during March, April and May 2005.

In addition to providing background on the issue and explaining how it has been addressed in some communities, witnesses drew the Committee's attention to a number of matters that needed to be considered in its examination of on-reserve matrimonial real property. Some of the key issues include:

- the need for solutions that recognize and are consistent with the inherent right of self-government;
- the need for any solution to appropriately balance individual equality rights and collective Aboriginal rights;
- the need for solutions to be driven by First Nations, and the need for consultation and collaboration with respect to the development of any legislation; and
- the need for resources to be provided to First Nations organizations and communities in order to enable them to develop and implement solutions.

Witnesses also identified a number of corollary issues, including the following:

- difficulties in enforcing court orders on reserves;
- the rights of non-member spouses;

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[8] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, Addendum, Mission to Canada, Advance Edited Version, E/CN.4/2005/88/Add.3, 2 December 2004, at para. 112, online: http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.88.Add.3.pdf

- the reluctance and/or lack of capacity of some communities to address this issue; and

- the fact that not all First Nations land is held or allotted in accordance with the *Indian Act* — some First Nations distribute land based on custom.

Many witnesses provided the Committee with creative options that could resolve the issue of on-reserve matrimonial real property.

1. EXISTING AVENUES FOR ADDRESSING THE ON-RESERVE MATRIMONIAL REAL PROPERTY ISSUE

This Committee heard that First Nations are currently addressing the on-reserve matrimonial real property issue in a number of ways: through self-government agreements; as required under the *First Nations Land Management Act*; and by including provisions relating to matrimonial real property in housing policies. Some First Nations have also created matrimonial real property by-laws. These by-laws, however, have been disallowed by the Department of Indian Affairs and Northern Development on the basis that there is no authority under the *Indian Act* for by-laws with respect to matrimonial real property.

A. SELF-GOVERNMENT AGREEMENTS

Wendy Cornet, the Special Advisor to the Department of Indian Affairs and Northern Development on matrimonial real property, explained that self-government agreements have addressed the issue in three ways. Some agreements recognize that a particular First Nation has jurisdiction over matrimonial property. Others include a shared jurisdiction between the First Nation and the province. The third approach adopted in self-government agreements has been to provide that provincial laws of general application will apply to matrimonial real and personal property located on reserve lands.[9] Maureen McPhee, Director General, Self-Government Branch, Department of Indian Affairs and Northern Development, confirmed that the government has adopted guidelines for federal negotiators that provide background on the on-reserve matrimonial real property issue and guidance on how to address it in negotiations.[10]

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[9] Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development (hereinafter called Evidence), 24 March 2005.

[10] Evidence, 7 April 2005.

B. THE FIRST NATIONS LAND MANAGEMENT ACT

The *First Nations Land Management Act* gives effect to the *Framework Agreement on First Nation Land Management*, which removes participating First Nation communities from the land management provisions of the *Indian Act*. Each participating community has to enact a land code for the management of reserve land and resources. It must also, within 12 months of the code's coming into force, either incorporate into the land code "general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land," or enact a law containing those rules.[11]

Chief Robert Louie, Chairman of the Lands Advisory Board, told the Committee that 7 of the 13 operational First Nations under the Framework Agreement have enacted matrimonial real property laws.[12]

C. HOUSING POLICIES AND BY-LAWS

While the Committee is aware that some First Nations have addressed the matrimonial real property issue in their housing policies, the Committee heard little evidence on this alternative. Similarly, the Committee heard little evidence relating to First Nations that had passed by-laws on the subject. Tom Vincent, Counsel, Operations and Programs Section, Department of Justice, confirmed that by-laws relating to matrimonial real property were disallowed:

> Section 81 simply does not empower a band council to make rules that deal with this issue. …
>
> Thus, the bylaw making power is not a source of local autonomy for band councils to address in preserving property rights of band members and non-band members.[13]

2. KEY ISSUES

A. THE INHERENT RIGHT OF SELF-GOVERNMENT

The Committee recognizes that the key matter to be taken into account in reviewing the matrimonial real property issue is that First Nations communities should have the autonomous authority to ultimately deal with the problem.

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11 *First Nations Land Management Act,* S.C. 1999, c. 24, section 17.

12 Evidence, 12 April 2005.

13 Evidence, 19 April 2005.

For First Nations, self-government is an inherent right, not a contingent or delegated right. Subsection 35(1) of the *Constitution Act, 1982* recognizes and affirms "existing aboriginal and treaty rights of the aboriginal peoples of Canada". Although the provision makes no explicit reference to self-government, the government has recognized the inherent right of self-government as an existing Aboriginal right under section 35. Conflict still arises, however, over how the government and First Nations interpret section 35. Margaret Buist, Legal Counsel from the Department of Justice, told the Committee that:

> In the context of matrimonial real property, it has yet to be determined if there is an aboriginal or treaty right or any other right or freedom. No court has pronounced on this, and in fact we don't have any court cases right now before the courts where a first nation or band has alleged that such a right exists.
>
> However, we do know that first nations have alleged such rights exist outside of courts in their testimony to various bodies. They allege that they have a general right to manage Indian lands. They also allege that they have a self-government right, a right that is recognized by Canada and, as a part of that self-government, first nations or bands allege they have the right to create their own laws with respect to family, with respect to separation on reserve lands or on their lands.
>
> … It's important to remember that Canada does recognize an aboriginal right to self-govern. However, it's unclear how this right would apply with regard to the development and implementation of a matrimonial real property regime on reserve lands.[14]

Prof. Kent McNeil noted that a key problem for First Nations wishing to resolve the on-reserve matrimonial real property issue is that their authority to deal with it is not clear:

> [C]an [first nations] act on their inherent right in order to resolve this problem? It's not clear that band councils can exercise the inherent right. Where does that inherent right actually reside? The Royal Commission on Aboriginal Peoples said it resides in aboriginal nations, not in local communities.
>
> There are real issues here about how first nations themselves can deal with it, so it's not just a question of first nations being unwilling to deal with or ignoring the issue. There are legal issues about their capacity to do so.[15]

B. BALANCING COLLECTIVE RIGHTS AND INDIVIDUAL RIGHTS

The need for any solution to appropriately balance the collective rights of First Nations (Aboriginal rights) and the individual rights of people who live on

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[14] Evidence, 5 April 2005.

[15] Evidence, 14 April 2005.

reserves (equality rights) was raised by a number of witnesses, including Margaret Buist, who explained what the "balancing of interests" is about:

> First Nations allege an aboriginal right to manage their own lands, to have their own family laws. And the individuals, both men and women, who are affected by the legislative gap on matrimonial real property have asked to have their equality rights recognized. They want the same treatment as people who live off reserve.[16]

Equality rights are protected under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, which states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Aboriginal rights are protected under section 35 of the *Constitution Act, 1982*:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> …
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Margaret Buist pointed to self-government agreements and the *First Nations Land Management Act* as examples of how to balance individual and collective rights:

> In self-government agreements, various approaches have been taken between the government and the first nations on how to deal with this issue. In the *First Nations Land Management Act*, the bands that join up to that regime create their own matrimonial and real property codes.
>
> So there are two examples of how a balancing has occurred between the individual equality rights and a recognition of the need for a matrimonial and real property regime, but balancing with the first nations' desire to have some control over the process occurring on their own land.[17]

Wendy Cornet noted that recognizing First Nations' jurisdiction over matrimonial real property in some way, coupled with legislation that would be in

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16 Evidence, 24 March 2005.

17 Evidence, 5 April 2005.

effect only until a First Nation exercised that jurisdiction, would "arguably balance the need to respect both individual and collective rights."[18]

Addressing the issue of balancing individual equality rights and collective Aboriginal rights, Candice Metallic, Legal Counsel for the Assembly of First Nations, stated:

> [T]here is an assumption first nations don't take into consideration the collective rights and the rights protected in the Charter … it's up to the individual communities to determine how those rights are going to be addressed within their spheres of jurisdiction.[19]

C. SOLUTIONS SHOULD BE DRIVEN BY FIRST NATIONS AND ANY LEGISLATION SHOULD INVOLVE CONSULTATION AND COLLABORATION

Many witnesses stressed that not only do First Nations need to be consulted when solutions to the matrimonial real property issue are being considered, but they should be the ones developing solutions. According to Chief Tina Leveque of the Assembly of First Nations Women's Council:

> The solutions will only be legitimate, and seen to be legitimate, if they come from the community and are supported by the community.[20]

In his appearance before the Standing Senate Committee on Human Rights in November 2004, the Minister of Indian Affairs and Northern Development stated that "it is vitally important that stakeholders be formally consulted on any proposal to amend the Indian Act."[21] Most of the witnesses that appeared before this committee emphasized the importance of consulting with First Nations on any legislative framework to address the matrimonial real property issue. Danalyn MacKinnon, a Northern Ontario family law practitioner, stated:

> The political reality … is that the more time you have to deal with putting together this legislation with the communities, the less backlash there will be.[22]

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18 Evidence, 7 April 2005.

19 Evidence, 12 April 2005.

20 Ibid.

21 Proceedings of the Standing Senate Committee on Human Rights, 22 November 2004.

22 Evidence, 7 April 2005.

Chief Tina Leveque confirmed that broad consultation was necessary:

> **[**W]e agree with the need for … broad consultations, not as a delay measure, but to ensure getting the best information and the best advice.[23]

Prof. Kent McNeil emphasized that a failure to consult First Nations could lead to opposition:

> [S]imple imposition by Parliament of a legislative regime isn't going to work. It's going to cause a lot of opposition … I don't think the opposition necessarily comes from the substance of legislation … but opposition arises over who is actually imposing it and where it is coming from.
>
> If it's coming from an acceptance by first nations of it as a desirable thing, and if they've got input and feel they've been part of the process, that they've had some choice, and it's not just something once again imposed by Parliament, then I think there's much more chance of acceptance and success.[24]

On the question that was raised during the hearings as to what could be considered adequate consultation, Prof. Larry Chartrand responded that there is no clear answer:

> The court has spoken in some detail as to the spectrum of the required degree of consultation, depending on the weight of the right at issue and the centrality of that issue to the community. The more important the right, the more consultation and the more insistence on accommodation. Ultimately, if the right is very serious and of fundamental importance to the community, there will be more insistence on full consent. So the court addresses it from the perspective of actual aboriginal communities who have a right.
>
> If government were to consult all the aboriginal communities in Canada, all the first nations who collectively have an aboriginal right, let's say a right to decide how matrimonial property is decided on a reserve, and the Crown wanted to justify an infringement because legislation that had been enacted arguably infringed that aboriginal right, what is the legal obligation of the government in terms of consultation in that context? Do they have to go to every single aboriginal community in the country and consult with them? If they don't, then they risk that community going to court and saying, "We weren't consulted, and you can't impose that on our community."[25]

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23 Evidence, 12 April 2005.

24 Evidence, 14 April 2005.

25 Ibid.

D. RESOURCES

The Committee heard that First Nations require resources to work on their own solutions, and that resources would also be needed to implement any interim federal legislation that might be enacted. Chief Tina Leveque stated:

> If Canada is serious about addressing matrimonial real property on reserve, it would provide first nations with adequate resources to develop such policies, initiate a strong first nations education campaign, and document best practices as a resource for other first nations.
>
> …
>
> We are recommending to this committee that resources be provided for first nations to draw on existing work and share best practices so they can begin to design their own policies and laws that will correct the problems and fill the gaps.
>
> …
>
> If we do get the adequate resources, we may not need legislation.[26]

Beverley Jacobs, President of the Native Women's Association of Canada, also requested resources for consultation:

> Our lawyers are working on drafting a possible piece of legislation, and we would like to use that in consultation with our aboriginal women in remote areas, urban areas, first nations communities, and all across the country. But we need the resources to be able to do that, because we don't have the resources….[27]

3. WITNESS RECOMMENDATIONS

A number of recommendations were made by witnesses who appeared before this committee. Most proposed direct solutions for resolving the on-reserve matrimonial real property issue, for example, the drafting of interim legislation that would create a matrimonial property regime on reserve lands. Others proposed solutions that would aim at resolving related issues, for example development of a First Nations Land Registry.[28]

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26 Evidence, 12 April 2005.

27 Ibid.

28 Testimony related to the creation of a First Nations Land Registry, as well as Chief Robert Louie's recommendation that the Department of Indian Affairs and Northern Development provide more resources to the First Nation Land Management Initiative is outlined in Appendix C: Issues For Follow-Up.

A. LEGISLATIVE OPTIONS

i. Amending the Indian Act or drafting legislation that would create a matrimonial real property regime on reserve lands

The majority of witnesses that appeared before this Committee either supported the idea of introducing interim legislation that would create a matrimonial real property regime on reserve lands or acknowledged its potential as a short-term solution. All agreed that any government legislation should be interim in nature. Chief Tina Leveque stated:

> We are not saying that we have to wait for finalization of self-government agreements to ensure the rights of our citizens are fully protected. We do not want Indian Act amendments, but there are interim measures that can be considered, provided it is understood these are interim measures that operate only until first nations assert their inherent jurisdiction and law-making authority.[29]

Candice Metallic confirmed the Assembly of First Nations' position with respect to the interim nature of any proposed legislation:

> [W]e want to be clear that any type of interim legislation — not amendments to the Indian Act, but a specific piece of interim legislation — has to be interim in nature, because essentially first nations will strongly assert we possess the inherent jurisdiction to deal with all the matters falling within the confines of our law-making ability within our communities, our traditional territories, so that has to be respected.[30]

Witnesses did not agree, however, on whether interim legislation should take the form of amendments to the *Indian Act* or should be introduced through a separate piece of legislation. Bonnie Leonard, a family law practitioner from British Columbia, recommended amending the Indian Act.[31] So did Ellen Gabriel, President of Quebec Native Women's Inc.:

> [Amending the *Indian Act* would] probably be the most efficient way at this time.
>
> …
>
> The hourglass has finished a long time ago on the effects on our communities, and in particular on aboriginal women and their families … I think the Indian Act revisions are the place to start, unless you can come up

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29 Evidence, 12 April 2005.

30 Ibid.

31 Evidence, 14 April 2005. Ms. Leonard also recommended amending the *Divorce Act*.

> tomorrow with a replacement to the Indian Act … [W]e have to use the tools we have for the moment.[32]

In contrast, Chief Tina Leveque stated unequivocally that amending the *Indian Act* was not the solution:

> The chiefs of Canada are clear: we do not want more tinkering with the Indian Act. The act is a source of this problem, and in fact the source of many of the problems we are grappling with today. We will not solve these problems by wallpapering more amendments over a flawed and crumbling piece of colonial legislation like the Indian Act.[33]

Prof. Kent McNeil provided the Committee with his analysis of why amending the *Indian Act* might be opposed:

> [I]t would be wrong to interpret opposition by first nations to parliamentary action to deal with this problem as meaning that those first nations or individuals who are opposing it are necessarily opposed to equitable division of matrimonial property. I think the matter is much more complex than that. It's really an issue of self-government. The Indian Act itself, I think, is seen as a colonial piece of legislation that has been in place for around 130 years, yet it's very difficult to know how to deal with that because it's become ingrained, it's part of the system, it's what people live with. But any changes to it are regarded as further colonialism and an interference with first nations' inherent right of self-government.[34]

On the matter of choosing between amending the *Indian Act* or drafting legislation so that provincial/territorial matrimonial property laws apply to real property on reserve lands, Jim Aldridge, General Counsel for the Nisga'a Lisims Government, explained why the Nisga'a chose the latter approach:

> They don't have to try to design a matrimonial law regime themselves, such as bands under the First Nations Land Management Act are obliged to do. There will be a smoother interface between their people and the rest of the province, without getting into difficult conflicts of laws issues.[35]

A number of witnesses made recommendations with respect to the mechanics of interim legislation. For example, Prof. Larry Chartrand suggested that the legislation should be developed as "opt-out" legislation:

> One solution may be to develop a matrimonial property code … it would be presumed that this code would apply to all bands unless the bands had established their own matrimonial property regimes, and in that case they

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32 Evidence, 5 May 2005.

33 Evidence, 12 April 2005.

34 Evidence, 14 April 2005.

35 Evidence, 5 April 2005.

> would be exempt from the provisions of the code. Subsequent bands could then opt out once they had established their own systems.
>
> It's kind of like the reverse of the First Nations Land Management Act, where the bands have to opt in to get under a new regime. In this case, the regime would be imposed, and then bands could opt out, or if they already had a system, they'd be exempt.[36]

Most witnesses, however, suggested the opposite, noting that the legislation should only come into play if a First Nation failed to develop a matrimonial property code within a defined period of time. As Danalyn MacKinnon noted, imposing legislation would not work as well as other processes. She suggested instead that:

> [First Nations] have two years to develop [their] own, and if [they] don't develop it within that timeline, the legislation will be imposed. This allows for those who have traditional methods of dealing with the issue.
>
> There's no sense in imposing legislation that is going to change that tradition, but if you have a time period, a couple of years, that allows for traditional communities to put forward their rules in writing … allowing the first nations to develop their own legislation does show respect and deals with the variety of situations.[37]

There did not appear to be agreement among witnesses as to the length of time that should be allowed for a First Nation to develop its matrimonial real property laws before federal legislation would apply to its reserve lands. Danalyn MacKinnon suggested that legislation should be imposed if a First Nation failed to adopt a matrimonial property law or code within two years.[38] Others felt a longer period was needed. Chief Robert Louie pointed out that the one-year time frame during which First Nations under the *First Nations Land Management Act* are required to develop a matrimonial property code has proven to be unrealistic:

> In essence, community consultation takes much longer than I think anyone really expected. Family law as it relates to property is indeed a complex issue, and the decisions communities make now will affect members' rights for years to come. It is indeed complex, and it indeed has a direct impact on people's lives.
>
> …
>
> Time is needed to determine the policy that the community is going to follow, which the council presumably will help direct. Time is needed to draft the law. Time is needed to consult. And perhaps most significant is the timeframe the community is involved in, given the complexity of issues. As well, there's time to actually enact the law.[39]

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36 Evidence, 14 April 2005.

37 Evidence, 7 April 2005.

38 Ibid.

39 Evidence, 12 April 2005.

He suggested that three years might be a more appropriate time frame. Joe Miskokomon of the Assembly of First Nations Renewal Commission suggested that three years with an additional extension of two years be granted to enable First Nations to develop a system of land management for matrimonial real property.[40]

Witnesses raised a number of subjects that could be included in the legislation. For example, Chief Tina Leveque stated that:

> [A]ny potential legislation must be a joint first nations and crown undertaking at the onset and must contain some fundamental provisions. For example, the legislation must be enabling rather than prescriptive. It must recognize the laws that have been developed by first nations such as the Sucker Creek First Nation. It must support the development of matrimonial property laws by first nations. The interim legislation would have to contain a sunset clause to ensure that it is truly interim and a non-derogation clause to protect first nations' inherent jurisdiction over these matters.[41]

Danalyn MacKinnon agreed that the legislation should not be prescriptive:

> There are communities where women have very high status and do not suffer these things, these difficulties. So it would not be fair to say that in those communities there must be forced legislation. The communities have somehow managed to develop their own methods of doing things that appears to be satisfactory to them.[42]

The Committee heard that the Native Women's Association of Canada was in the process of drafting interim legislation that it hopes to use to carry-out cross-country consultations in First Nation communities. Mary Eberts, Legal Counsel for the Native Women's Association of Canada, described some of the proposed legislation's elements when she appeared before the Committee:

> First of all, it contains a permission for Indian bands to have their own land codes, and where there is such a land code the provisions in the *Indian Act* would not apply. It is essential that the sovereignty and self-government of Indian bands be recognized by allowing them to pass their own land codes, whether they're under the land management act or not.
>
> These would be family law, matrimonial home land codes that would cover the situation where a band had taken the trouble to develop one. Where a band had not, the draft legislation of the Native Women's Association of Canada provides for exclusion orders where there is family violence, orders of possession at the instigation of either spouse, or a transfer or sale order at the instigation of either spouse.

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40 Evidence, 3 May 2005.

41 Evidence, 12 April 2005.

42 Evidence, 7 April 2005.

> Those four elements, in our respectful submission, are the bare essentials for any legislative solution to this problem. That is the opportunity for Indian band governments to step up and have their own matrimonial property regimes and then the orders of exclusion, possession, transfer, or sale…would be available under the Indian Act if those Indian band government did not do so.[43]

According to Ms. Eberts, the legislation should also: recognize the right of each spouse to occupy the family home during the relationship, regardless of who has the Certificate of Possession that establishes lawful possession;[44] allow spouses to make agreements about their land and their family home; recognize common-law partners; and be consistent with federal legislation that recognizes same-sex partners.

Ellen Gabriel recommended amendments to the *Indian Act* that would:

- establish a matrimonial property regime that provides that all property acquired during the marriage is the property of both spouses;
- ensure that men and women have equal rights to matrimonial property and guarantees a fair division of matrimonial property on the breakdown of the relationship;
- apply the matrimonial property amendments to common-law couples; and
- allow the parent who has custody of the children to remain in the family home.[45]

Another element to proposed interim legislation that was suggested by witnesses would require First Nations to meet minimum standards when developing their matrimonial property laws or codes. The Standing Senate Committee on Human Rights recommended that First Nations' matrimonial property laws or codes would need to meet the standards of provincial legislation in order to be recognized. Danalyn MacKinnon recommended that equality principles should be used as a guideline. Prof. Larry Chartrand recommended instead that First Nations' matrimonial real property codes should have to respect international human rights standards. In his view, using international standards as opposed to provincial ones might be more desirable from the perspective of respecting First Nations' self-governing authority:

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43 Evidence, 3 May 2005.

44 *Indian Act*, section 20(2).

45 Evidence, 5 May 2005.

> It is still a violation of the principle of self-government to impose any condition when an aboriginal government is exercising its legitimate jurisdiction. However, interference with a first nation self-government authority may be justified — and I use the term justified in a broad moral sense — when Canada is under an international obligation to ensure that certain minimum human rights are upheld, but only until such time as first nations become independently responsible for compliance with international human rights norms.[46]

Finally, Chief Tina Leveque acknowledged that coming up with a solution would not be easy:

> Inevitably, there are always going to be clashes.That's the nature of humanity — one group opposing another group: one says yes, one says no. But the one thing that humanity is gifted with is the power of reason. So, yes, I know there are going to be challenges and opposition maybe, but I'm still of the notion that we can get beyond that with the power of reason. That's the reason we're here today. We've made many advancements in Indian country on many issues, and I see this as no different from any other issue. We will advance beyond this. In spite of the obstacles and the challenges we face, we can get beyond it. I truly believe that.

Witnesses did convey to this committee that barriers would need to be addressed in order for interim legislation to be effectively implemented on reserves. One of the key problems they identified was the enforcement of legislation on reserves.[47] As Margaret Buist explained, past experience with by-laws suggests that it might be difficult to enforce a matrimonial real property code or provincial/territorial matrimonial property legislation on reserve lands:

> [First Nations leaders] raise concerns that the law is being brought into disrepute for a lack of enforcement and prosecution mechanisms …
>
> It's also costly for the police to enforce band bylaws and involves significant resources.[48]

ii. Repealing or amending section 67 of the Canadian Human Rights Act

During the Committee's hearings, section 67 of the *Canadian Human Rights Act* was raised on a number of occasions. Margaret Buist explained how section 67 prohibits an individual on reserve lands from claiming that a band council decision made under the *Indian Act* is discriminatory under the *Canadian Human Rights Act*. She stated that removing section 67 "would open an important avenue for equality

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46 Evidence, 14 April 2005.

47 An additional enforcement problem that was identified is that section 89 of the *Indian Act* prohibits the seizure of real and personal property of an Indian situated on a reserve by someone who is not an Indian. This may be of interest to non-member spouses.

48 Evidence, 19 April 2005.

for individuals on reserve."[49] Chief Tina Leveque acknowledged the potential validity of repealing section 67:

> Repealing [section 67 of the *Canadian Human Rights Act*] would expose the Indian Act to those protections and provide mechanisms to enforce equality and fairness. In this way we would avoid tinkering with a piece of legislation that is going to wither and die anyway as first nations move toward real self-determination.[50]

Beverley Jacobs also acknowledged that discussions relating to the repeal of section 67 are relevant because repeal would provide women with an avenue of recourse.[51]

B. NON-LEGISLATIVE OPTIONS

A number of non-legislative options were presented by various witnesses. Two witnesses noted the importance of money being made available through a lending institution. This money could be accessed by individuals on reserves who need to make an equalization payment following the breakdown of a relationship. For example, Bonnie Leonard suggested that:

> [A] pilot project be established whereby a lending institution would be created and specifically mandated with providing funds to those people who have obtained orders of compensation … something similar to the First Nations Agricultural Lending Association, where the government provides the start-up capital, the lending capital. The funds would be administered by a group, and they'd be specifically for compensating women or men in these situations. You could have a flexible payment plan, and there could be a formal evaluation system adopted.
>
> …
>
> [O]nce a person goes through the court system and the courts are aware of this fund being available, the court would be more likely to order compensation orders, and evaluations could be made by the courts based on the evidence. It would be on a case-by-case basis. And once a person had the court order for compensation they could then apply to the lending institution to obtain the loan they would need to pay the other spouse their fair share of the matrimonial property.[52]

Joe Miskokomon made the following suggestion with respect to a lending institution:

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49 Evidence, 5 April 2005.

50 Evidence, 12 April 2005.

51 Ibid.

52 Evidence, 14 April 2005.

> Industry Canada [should] expand the mandate of the aboriginal capital corporations to have the authority to establish loans for the purposes of matrimonial real property divisions, and land value being secured by the first nations themselves. The ability of an aboriginal capital corporation to determine interest rates that reflect the same commercial rates as other lending institutions should also be put in place. Securing and adapting the ACC as one of the integral mechanisms to achieving equitable distribution upon marriage breakdown in a first nation is an example of infrastructure and fair resourcing needed to accomplish the goal of addressing MRP.[53]

Prof. Patricia Monture believed that success in assisting women and children who are affected by matrimonial real property issues on the breakdown of marriage, particularly in cases of domestic violence, would be found not in legislation but in focusing on housing programs. She aptly summarized some of the concerns that have been raised over the years, and during this committee's study, with respect to putting in place and implementing federal matrimonial real properly legislation on reserve lands:

> I'm skeptical that the practical reality is that if you legislated a matrimonial property law regime … women would have access, … it would overcome the isolation, they'd have access to legal counsel, that in the outcome … actually filling the statutory gap would actually have a meaningful outcome for women in first nations' communities.
>
> It's not that I'm just practically [opposed], as a person who believes in our traditions, and believes that we're sovereign. It's not that I'm just principally opposed to a statute. I actually don't see that in the practical reality that's going to fix the solution.
>
> …
>
> I'm not sure that an actual section in the *Indian Act* or stand-alone legislation is actually going to implement the kind of change that we want.[54]

Prof. Monture elaborated further as to what should be included in a housing program that would alleviate the harm caused by the issue on reserve lands. Because women often do leave the reserve after the breakdown of a relationship, the housing program would need to have both an on-reserve and an off-reserve component. The program would need to provide women with short-term solutions as well as support over a longer period of time. A critical component of the program would be the need to acknowledge "that keeping women safe in small communities is a challenge."

RECOMMENDATIONS

The Committee acknowledges that a number of non-legislative options were presented to us. While we believe that the non-legislative options have the potential

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53 Evidence, 3 May 2005.

54 Evidence, 5 May 2005.

to address some of the related issues that have been brought to our attention, we do not believe that these options can address the issue as directly or as quickly as a legislative solution.

The Committee has carefully considered all the legislative options presented by witnesses, in light of three fundamental considerations that have informed virtually all the testimony before us. The first is the need for immediate action, based on the urgency of the ongoing situation on First Nations reserves. The Committee concurs with previous domestic and international reports indicating that the human rights of First Nations individuals, most frequently women and children, are violated each time they are unable to exercise rights with respect to matrimonial real property that they would have outside of the reserve. Thus, although acknowledging that further study of the issue might well elicit additional suggestions for action, the Committee has concluded that prolonging the present state of affairs is not an option it is prepared to entertain. In reaching this conclusion, the Committee wishes to underscore its recognition that the affirmation of individual rights and the development of remedies to address on-reserve property matters should not detract from the unique collective rights of First Nations people.

The second fundamental premise that has guided the Committee's deliberations involves recognition of First Nations' inherent right of self-government. For the Committee, respect for the inherent right involves giving practical expression to this recognition, including in the area of on-reserve matrimonial real property. The autonomous capacity of First Nations to develop and implement their own solutions in a manner suitable to their cultural circumstances, pending the completion of more comprehensive self-government regimes, should and must be positively reflected in any government action seeking to address immediate concerns.

For the Committee, the third governing principle that must be observed in the development of any legislative approach relates to the need for extensive consultation of and collaboration with First Nations. This imperative was stressed by witness after witness, for whom adequate input from First Nations themselves as integral partners in the process of devising solutions was key to implementation of those solutions. The Committee considers, moreover, that the active involvement of First Nations women's groups and representatives is especially indispensable to the endeavour of resolving longstanding grievances in the area of on-reserve matrimonial real property. The Committee is mindful that, in the main, the lives and concerns of First Nations women and their children are in play here. First Nations women must play a prominent role in defining appropriate solutions.

The Committee believes that, in order to address the urgency of the situation and at the same time respect the inherent right of self-government, a two-pronged approach that will couple immediate action with a longer-term solution is warranted.

IMMEDIATE ACTION

Therefore, the Committee recommends:

RECOMMENDATION 1:

a) That, consulting with the Native Women's Association of Canada and the Assembly of First Nations to the extent possible, considering the urgency of the situation, the government immediately draft interim stand-alone legislation or amendments to the *Indian Act* to make provincial/territorial matrimonial property laws apply to real property on reserve lands.

This legislation should also:

- **reflect a partnership process among government, the Native Women's Association of Canada and the Assembly of First Nations;**
- **recognize First Nations' inherent jurisdiction with respect to matrimonial real property;**
- **authorize First Nations to enact their own matrimonial property regimes in an enabling rather than prescriptive manner;**
- **set out a time frame for the development by First Nations of their matrimonial real property regimes;**
- **contain a sunset clause providing that the legislation will lapse at the end of that time period; and**
- **contain a non-derogation clause providing that nothing in the legislation abrogates or derogates from First Nations' section 35 Aboriginal and treaty rights.**

In order to assist First Nations in the exercise of their jurisdiction over on-reserve matrimonial real property, the Committee further recommends

b) That the government commit to providing recognized national and provincial/territorial First Nations organizations with the human and financial resources required to enable them to assist

members to develop their own matrimonial real property codes; and

c) That the government provide additional support for First Nations wishing to create matrimonial real property laws by developing a Web site to showcase "best practice" examples of matrimonial real property laws.

LONG-TERM ACTION

RECOMMENDATION 2:

Recognizing that not all First Nations may be in a position to develop their own matrimonial real property regimes in the time allotted, and the resulting need for a longer term solution, the Committee further recommends

That, in broad consultation with First Nations organizations and communities, the government collaborate with those organizations and communities to develop substantive federal legislation on matrimonial real property for those First Nations that have not created their own laws on the subject matter within the time frame set out in the interim legislation. This legislation should cease to apply to First Nations that subsequently develop their own matrimonial real property regimes.

SECTION 67 OF THE CANADIAN HUMAN RIGHTS ACT

The Committee notes that concerns have been raised in the past that the removal of section 67 with no other action might not be desirable. For example, the *Canadian Human Rights Act* does not explicitly allow for Aboriginal culture and values to be taken into account when complaints of discrimination under the *Indian Act* are considered.[55] The Committee is aware that the 2000 report of the Review Panel studying reform of the federal human rights legislation recommended both repeal of section 67 and the insertion of an interpretive provision to ensure both that Aboriginal community interests would be considered, and an appropriate balance between those interests and individual rights.[56]

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[55] "The Indian Act Exemption — Options for Reforming the *Canadian Human Rights Act*", by Larry Chartrand, online: http://canada.justice.gc.ca/chra/en/indact1.html.

[56] Canadian Human Rights Review Panel, *Promoting Equality: A New Vision*, June 2000, Ottawa, p. 132.

The Committee agrees with those witnesses who pointed to the repeal of section 67 as opening an avenue of redress for on-reserve First Nations women and others with grievances related to the matrimonial real property issue, while noting that repeal would open that same avenue for other groups and individuals affected by decisions under the *Indian Act.* It considers that the repeal issue is also a matter requiring consultation with First Nations organizations and communities, specifically in light of the need to develop measures that respect both individual and collective interests.

Therefore, the Committee recommends:

RECOMMENDATION 3:

That, in broad consultation with First Nations organizations and communities, the government undertake immediate review of section 67 of the *Canadian Human Rights Act* with a view to amending that legislation

- **to protect on-reserve First Nations individuals from discrimination under the *Indian Act* and**
- **to insert an interpretive clause requiring a balance between individual and community interests.**

CONCLUSION

In the course of its study of on-reserve matrimonial real property, this committee has come to appreciate that there is not one ideal solution that would meet the needs of all First Nation communities. The solution that is best for any given community, the Committee believes, can only be found by that community, exercising and implementing its inherent right of self-government. As our recommendations attest, however, this appreciation does not discharge this Committee or the government from their responsibility to ensure that individuals on reserves do not continue to be deprived of remedies available to other First Nations people and other Canadians who do not live on a reserve when their conjugal relationships break down.

This committee anticipates that, in time, solutions to matrimonial real property problems will be developed and implemented by all First Nations communities. One hopes that First Nations that have successfully addressed this issue in their communities may serve as models to those requiring greater assistance in the short term, and that government will make every effort to speed that process, consulting and collaborating with First Nations.

Until that time comes, however, this Committee, like the Standing Senate Committee on Human Rights, like the Royal Commission on Aboriginal Peoples, like other domestic and international observers, firmly believes that the government must take immediate action to address this pressing issue. As more than one witness told us, time is of the essence.

LIST OF RECOMMENDATIONS

IMMEDIATE ACTION

RECOMMENDATION 1:

a) That, consulting with the Native Women's Association of Canada and the Assembly of First Nations to the extent possible, considering the urgency of the situation, the government immediately draft interim stand-alone legislation or amendments to the *Indian Act* to make provincial/territorial matrimonial property laws apply to real property on reserve lands.

This legislation should also:

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That, in broad consultation with First Nations organizations and communities, the government undertake immediate review of section 67 of the *Canadian Human Rights Act* with a view to amending that legislation

- **to protect on-reserve First Nations individuals from discrimination under the *Indian Act* and**

- **to insert an interpretive clause requiring a balance between individual and community interests.**

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to the report within one hundred and twenty (120) days.

A copy of the relevant Minutes of Proceedings (*Meetings Nos. 24 to 39*) is tabled.

Respectfully submitted,

Nancy Karetak-Lindell, M.P.
Chair

APPENDIX A
REPORTS THAT HAVE REFERRED TO THE ON-RESERVE MATRIMONIAL REAL PROPERTY ISSUE

A number of references and recommendations have been made with respect to the on-reserve matrimonial real property issue. Some of the domestic and international reports that have referred to the issue include:

- The 1991 Report of the Aboriginal Justice Inquiry of Manitoba;
- The 1997 Report of the Royal Commission on Aboriginal Peoples, Volume 3, *Gathering Strength;*
- The 2001 Report of the Special Representative, *Where are the Women?: Report of the Special Representative on the Protection of First Nation Women's Rights*, by Mavis Erickson
- The November 2003 Interim Report of the Standing Senate Committee on Human Rights, *A Hard Bed to Lie In: Matrimonial Real Property On Reserve*;
- The 1998 Report of the United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*;
- The 2004 Report of the United Nations Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum, Mission to Canada*;
- The 2005 Report of the United Nations Housing Rights Programme, *Indigenous peoples' right to adequate housing: A global overview*.

The Department of Indian Affairs and Northern Development also had the following papers commissioned on this issue:

- *Discussion Paper: Matrimonial Real Property On Reserve*, by Wendy Cornet and Allison Lendor;
- *Urban Aboriginal Women in British Columbia and the Impacts on the Matrimonial Real Property Regime*, by Karen Abbott;
- *Towards Resolving the Division of On-Reserve Matrimonial Real Property Following Relationship Breakdown: A Review of Tribunal, Ombudsman and Alternative Dispute Resolution Mechanisms*, by Jo-Ann E.C. Green; and

- *Division of Matrimonial Real Property on American Indian Reservations*, by Joseph Thomas Flies-Away, Carrie Garrow, and Miriam Jorgensen for the Harvard Project on American Indian Economic Development.

APPENDIX B
RECOMMENDATIONS CONTAINED IN THE STANDING SENATE COMMITTEE ON HUMAN RIGHTS' INTERIM REPORT, *A HARD BED TO LIE IN: MATRIMONIAL REAL PROPERTY ON RESERVE*

With respect to immediate action to be taken, the Committee recommends that the *Indian Act* be amended so that provincial/territorial laws with respect to the division of both personal and real matrimonial property can apply. As stated in the present report, this is only a partial solution. The Committee will make further recommendations in its final report as to measures to be implemented so as to avoid the distinctions provided in provincial legislation, *inter alia* those based on marital status.

The Committee recommends that the amendments to the *Indian Act* take into account the fact that some First Nations already have measures in place with respect to the division of matrimonial property and that they should be able to continue to follow their own rules so long as they afford protection at least equivalent to that offered by provincial legislation.

The Committee recommends that the amendments to the *Indian Act* take into account the rights of children, including their right to continue to live in their community. The Committee will make more precise recommendations in its final report.

The Committee recommends that the *Indian Act* be amended so as to recognize a right of occupancy of a residence to protect those whose name does not appear on the Certificate of Possession, or when the Certificate of Possession is held by a third party.

The Committee recommends that it be made possible to register on-reserve family homes so as to protect the rights of spouses.

Inasmuch as access to reserve lands is tied to Indian status and Band membership, the Committee recommends that the *Indian Act* be amended so that not only the women who lost their status prior to 1985, but also their children and their grandchildren may have status and membership, and so that women who upon marriage lost their membership in the First Nation into which they were born would automatically regain it should their marriage break down, should they so wish.

With respect to immediate action to be taken, the Committee also recommends that the issue of division of matrimonial property be expressly addressed in any self-

government negotiations and that specific provisions on this issue be included in any agreement-in-principle and final agreement.

For the longer term, the Committee recommends that appropriate funding be given to national, provincial/territorial and regional Aboriginal women's associations so that they can undertake thorough consultations with First Nations women on the issue of division of matrimonial property on reserve. These consultations should be the first step in a larger consultation process with First Nations governments and Band councils with a view to finding permanent solutions which would be culturally sensitive, with the unequivocal understanding that there can be no cultural justification for violations of human rights protected under the Canadian Charter and international law.[1]

[1] *A Hard Bed to Lie In: Matrimonial Real Property On Reserve,* Interim Report of the Standing Senate Committee on Human Rights, November 2003, pp. 12-13, online: http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf

APPENDIX C
ISSUES FOR FOLLOW-UP

A. Creating a First Nations Land Registry

When Chief Strater Crowfoot appeared before this Committee, he stressed the importance of addressing other land issues:

> It is tempting to look at this issue of matrimonial property rights as a single issue that can be resolved with a single solution. I don't view it that way. To me it's a much larger issue. Frankly, we lack the institutional framework necessary to support clear property rights and attract investment. The result is that our current properties are grossly undervalued, and market mechanisms to resolve matrimonial property rights are absent.
>
> The root cause of this problem and of many problems we face is that we are governed by legislation that is over 120 years old. We are run by a bureaucracy that still thinks central planning works.[1]

He recommended that an opt-in First Nations Land Registry be created, which would facilitate a title guarantee, contain a process for resolving competing interests in land, and protect matrimonial property.

The Standing Senate Committee on Human Rights had made a similar recommendation of making it possible to register on-reserve family homes to protect the rights of spouses.

B. Increasing resources allocated to the First Nations Land Management Act

When Chief Robert Louie, Chairman of the Lands Advisory Board, appeared before the Committee, he stressed that increasing government support for the land management initiative would increase the number of First Nation communities that are required to address the issue of on-reserve matrimonial real property:

> Right now we have, as I indicated, 14 operational First Nations. We have room to add additional First Nations that may wish to join the land management initiative, and subsequently to then work and develop their real property loss. Part of the flaws, I believe, that exist today is getting the support from government to add the additional First Nations that right now are desperately waiting to join the land management initiative. So in that alone I would suggest to you that there would be many more communities more than willing to address the matrimonial real property

[1] Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 21 April 2005.

law. The need is there, the desire is there, but we need the government support.

Former Minister Nault had announced several years ago, while he was then Minister of Indian Affairs, that there would be in fact a rolling 30 First Nations involved in the developmental phase to deal with land code and to work on their matrimonial real property laws. Unfortunately, there has been some non-support, I believe, from government to actually meet that test and to have these numbers actually involved. We're facing that situation today, where we have room for additional First Nations. The funding has been committed by Canada, but we do not have the support of Canada to add these communities into the land management initiative. I believe that is a serious flaw, and that is something that I see could be done.[2]

[2] Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 12 April 2005.

APPENDIX D
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Indian Affairs and Northern Development	22/03/2005	24
Wendy Cornet, Special Advisor		
Sandra Ginnish, Director General, Treaties, Research, International and Gender Equality Branch		
Department of Justice		
Margaret Buist, Counsel, Legislative Initiatives		
Department of Indian Affairs and Northern Development	24/03/2005	25
Wendy Cornet, Special Advisor		
Sandra Ginnish, Director General, Treaties, Research, International and Gender Equality Branch		
Department of Justice		
Margaret Buist, Counsel, Legislative Initiatives		
Department of Justice	05/04/2005	26
Margaret Buist, Counsel, Legislative Initiatives		
As an Individual		
Jim Aldridge, General Counsel, Barrister and Solicitor, Nisga'a Lisims Government		
Department of Indian Affairs and Northern Development	07/04/2005	27
Cindy Calvert, Senior Policy Advisor, First Nations Land Management Initiative, Lands Branch		
Bruce Cooper, Senior Policy Analyst, Land Directorate, Lands and Trust Services		
Wendy Cornet, Special Advisor		
Paul Fauteux, Director General, Lands Branch		
Maureen McPhee, Director General, Self-Government Branch		
Department of Justice		
Bernadette MacLeod, Counsel		
As an Individual		
Danalyn MacKinnon, Barrister, Solicitor, Beamish MacKinnon Law Office		

Organizations and Individuals	Date	Meeting
Assembly of First Nations	12/04/2005	28
Marie Frawley-Henry, Senior Policy Analyst		
Chief Tina Leveque		
Candice Metallic, Associate Legal Counsel		
Lands Advisory Board		
Austin Bear		
Robert Louie, Chairman		
William McCue, Counsellor		
Barry Seymour		
Frank Whitehead		
Native Women's Association of Canada		
Cherlyn Billy, AHRDA Coordinator		
Marilyn Buffalo, Member		
Beverley Jacobs, President		
As an Individuals	14/04/2005	29
Bonnie Leonard, Lawyer		
Kent McNeil, Professor, Osgoode Hall Law School, York University		
Larry Chartrand, Director, Aboriginal Governance Program, University of Winnipeg		
Department of Indian Affairs and Northern Development	19/04/2005	30
Holly King, Acting Director, Women's Issues and Gender Equality		
Department of Justice		
Margaret Buist, Counsel, Legislative Initiatives		
Tom Vincent, Counsel, Operations and Programs Section		
Indian Taxation Advisory Board	21/04/2005	31
Strater Crowfoot, Chairman		
Assembly of First Nations	03/05/2005	32
R.K. (Joe) Miskokomon, Co-Chair, Renewal Commission		
As an Individual		
Mary Eberts, Legal Counsel, Eberts Symes Street Pinto and Jull		

Organizations and Individuals	Date	Meeting
Quebec Native Women Inc.	05/05/2005	33
Ellen Gabriel, President		
As an Individual		
Patricia Monture, Professor, Department of Sociology, University of Saskatchewan		