

# Canada/First Nations/First Nations Women Policy Dialogue Process on Matrimonial Real Property Issues (MRP)

*How cultural perspectives, different knowledge traditions and power relationships have affected the rights dialogue on First Nations' gender equality and collective rights issues in Canada*

# First Nations and Federal Law

- There are approximately 630 recognized First Nation communities belonging to 80 or so distinct indigenous nations (culturally, linguistically and territorially distinct).
- For most of Canada's history, federal "Indian" legislation has played a dominant role in the legal treatment of First Nations people on "reserves" (for the purpose of this presentation can be imprecisely described as land to which the *Indian Act* applies.)

# Canada: Britain's Colonial Successor for First Nations

- Until a human rights movement by First Nations war veterans after both World Wars, First Nations people experienced numerous explicit forms of legal discrimination at the individual level in terms of civil, political, social, cultural and economic rights, particularly in life off the reserves.
- At the same time First Nations people were pressured to “assimilate” and their cultures, languages and religions actively suppressed and denigrated through Indian residential schools, the *Indian Act* and many other policy and legal measures.

# Individual and Collective Rights Violations

- Various forms of resistance are evident throughout this history.
- Dismantling the individual human rights violations has been slow: a lot accomplished but some important issues remain that are linked to collective rights issues (e.g. who defines the legal definition of individuals as “Indian” or “First Nation”).
- Collective rights protection (land, resources and self-government) has been equally, if not more, challenging.

# Matrimonial Real Property: The Narrow Legal Issue

- Most “Indian” reserve lands are governed by the federal *Indian Act*. It does address the issue of matrimonial property other than a few provisions affecting wills and estates.
- Provincial laws cannot affect rights of “Indians” collectively or individually in their reserve lands. Therefore provincial matrimonial property laws can only apply to “Indians” on reserves in regard to personal property located on reserves.
- First Nations law in the area has not been recognized and there has been little federal interest in doing so other than through delegated federal powers with prescriptions on how to exercise it and/or federal oversight.

# Matrimonial Real Property – A “Women’s Issue”?

- Men, women, boys and girls are deeply affected by marital breakdown and domestic violence.
- Nevertheless, MRP is clearly a women’s gender equality issue: both the available statistics and First Nations’ women’s activism on the issue support the conclusion that more First Nations’ women than First Nations’ men are negatively impacted or more severely impacted by the general lack of an identifiable legal regime to address spousal rights to the family home on reserves.
- There is a need for a legal regime to deliver protection and recognize rights to shelter for women and children upon marriage breakdown and in cases of domestic violence.

# Matrimonial Real Property – The Broader Dialogue

- MRP policy issues are situated in the larger policy challenge of (quasi-)decolonization: aimed at protection of First Nations land and resource rights, exercise of self-determination and various legal actions and political activity for compensation for past and ongoing impacts of colonization, such as the Indian Residential School experience.

# The role of gender bias in the colonization experience of First Nations

- It appears most, but not all, First Nations societies prior to colonization were either matrilineal and matrilineal or egalitarian in terms of property and kinship rules.
- Christian missionaries and colonial and federal governments launched unremitting attacks on these societies through law and policy in part due to the lack of patriarchal values.



# The role of gender bias in the colonization experience of First Nations

- Colonial campaign to take First Nations' lands and resources aimed to destroy their societies and cultures by focusing on the legal and social status of women in First Nations societies.
- Federal law sought to forcibly assimilate First Nation women by controlling the legal definition of "Indian" which determined who could reside on "Indian" reserve lands.
- Federal law applied gender biased definitions to decrease the numbers of those with legal status as "Indians"; forced physical removal and legal removal of Indian status from women who "married out" (but not men) and the children of these marriages - regardless of the women's wishes or those of their communities.

# The role of gender bias in the colonization experience of First Nations

- The plan? When all the people were eventually assimilated or had died from disease or other impacts of colonization, the colonizers could finally take their “reserve” lands.
- (Ironically, the legal fiction “terra nullius” used to start the colonial project would finally have some basis in reality– the land would be empty of indigenous people. )
- Federal law also imposed legal disabilities on First Nations women respecting capacity to hold rights to occupy individual allotments of reserve land, wills and estates matters, voting in “band” council elections, etc.

# More General Impacts of Colonialism Through Federal Law

- *Indian Act* speaks to an objective of imposing a uniform system of individual landholding (not amounting to fee simple) on all First Nations in place of communal systems based on customary law.
- Also seeks to impose a single Euro-Canadian vision of governance and democracy on a diverse range of distinct nations with their own governance traditions and means of determining land use within their communities.
- Attempts to impose Euro-Canadian legal conventions respecting individual “rights” and their place in relationship to collective interests.

# Some First Nations Values and Knowledge Traditions

- Great diversity among First Nations but there are some broad commonalities
- Areas of divergence from Euro-Canadian legal norms and values: notions of “property” and “ownership of property” vs. a relationship of respect and caring for the land, for animals as well as inanimate objects (rocks and minerals) which are sacred gifts from the Creator; humans cannot own the land and have responsibilities not to mercilessly exploit her resources because the Creator has entrusted us with the duty to care for it as stewards for future generations – “to the seventh generation”.

# Divergent Values & Perspectives

- A legal regime founded on notions of “Individual rights” that can compete against each other **versus** mutual and reciprocal responsibilities of individuals to each other (values and cultural imperatives of mutual caring and respect in which ‘equality’ of individuals, of men and women is so necessarily implicit it need not be expressed explicitly);
- man-made statute law **versus** “natural law”/spiritual direction from the Creator who speaks through ancestors, the land, the animals and other modalities.

# Indigenous Peoples' Values Attacked

- The colonial project sought to extinguish the cultural, social, political and economic expression of such values; seen as obstacles to absorbing or removing First Nations from the valuable lands and resources Europeans wanted to exploit to amass and control wealth through individual rights.

# Indigenous Peoples' Resistance

- Efforts to eradicate customary laws in many areas have failed.
- A competing system to the *Indian Act* for determining individual rights to reserve lands exists today on about half of reserves; customary law systems controlled and designed by First Nations – “extra-legal” from federal viewpoint.

# The MRP Gender Equality Storyline

- 1986 – Supreme Court of Canada determines in two cases launched by First Nations women that provincial matrimonial property laws based on equal rights in, and division of matrimonial property cannot be applied to individual interests of First Nations in reserve lands.
- Many years of litigation to get to this point.



# The MRP Storyline (cont'd)

- Federal response – nothing until June 2007 when pressure had mounted through a series (seven) UN human rights reviews that are critical of Canada. There is also a domestic court case alleging breach of Charter equality rights and other rights.
- The federal impetus to finally act is very much a result of First Nations women' activism, domestically & internationally.

# The MRP Storyline (cont'd)

- Native Women's Association of Canada and the Assembly of First Nations, after years of antagonism, move closer together – adopting very similar analyses of the relationship between collective and individual rights from a First Nations perspective, and of how the issue needs to be framed within a larger decolonization context.

# The MRP Storyline (cont'd)

- Despite frank advice otherwise from the Ministerial Representative on the issue (also a woman and former Chief), the Native Women's Association and from the Assembly of First Nations – the government consistently framed the issue in stereotypical terms – the government will deliver “equality” to women (denying agency of First Nations women); implying that First Nations women need and want protection from their own men through the agency of outsiders rather than assistance in constructing a safe process to resolve the issue within their communities.

# The MRP Storyline (cont'd)

- No acknowledgement of longstanding role of the federal government in the legal subjection of First Nations women in their own communities.
- Despite joint front from AFN Chiefs and the Native Women's Association of Canada, no commitment to legal aid or other resources needed at community level such as desperately needed housing assistance, to local dispute resolution mechanisms, no recognition of inherent (not delegated) jurisdiction of First Nations in Bill C-47.

# The MRP Storyline: Concluding chapter

- Bill C-47, An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves (the Family Homes on Reserves and Matrimonial Interests or Rights Act) was introduced in the House of Commons on 4 March 2008. Provided for the delegation of federal power rather recognizing First Nations' inherent jurisdiction relating to "the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves" (clause 7(1)).
- Where a First Nation does not have such laws in force, whether established under the bill, under the *First Nations Land Management Act*, or under a self-government agreement, provisional federal rules established in the bill will apply.

# The MRP Storyline: Concluding chapter

- First Nations organizations included in drafting of a Bill up to a point, but key recommendations not accepted and federal government reserved final decision making power over every aspect of the legislation and would share no information or commitment on resources to ensure implementation.
- Federal Bill tabled in the House of Commons by Prime Minister Steven Harper's government with governing party and MPs determining final shape of Bill C-47 without First Nations consent.