

Comments on the proposed Bill S-2 - 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

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October 27th, 2011

Background

In September 2003, PCWM prepared a Brief to the Standing Senate Committee on Human Rights on the topic of *On-Reserve Matrimonial Real Property on the Breakdown of a Marriage or Common Law Relationship and the Policy Context in which they are Situated*. NCWC and PCWM both prepared Briefs on the [Bill C7](#), First Nations Governance Act in February 2003, highlighting the need to address the issue of protection of Human Rights for First Nations peoples on Reserve. We were pleased to see that [Bill C-21](#) did just that, and was given Royal Assent in June 2008.

Both these earlier Briefs identify our history with the issues, particularly as they affect First Nations' women. We are aware of and acknowledge the harmful effects of colonization and the impact of the 135 year old Indian Act. "From the aboriginal perspective, it (colonization) refers to loss of lands, resources, and self-direction and to the severe disturbance of cultural ways and values" (Larocque, 1994). The Indian Act has contributed to the exclusion of First Nations' women from decision making bodies pursuant not only to a discriminatory membership practice, but to the importation of European governance practices.

In June 2011, NCWC signed a [Joint Declaration](#)¹ with the Native Women's Association of Canada (NWAC) and the Assembly of Manitoba Chiefs (AMC). This Declaration was particularly concerned about the missing and murdered Aboriginal women and girls, but also addressed the systemic issues facing our Aboriginal sisters:

Delegates affirm, assert and recognize Inherent and Treaty Rights of Aboriginal Peoples in Canada and seek to support the full and equitable participation of Aboriginal Peoples, in particular Aboriginal women and girls, within Canadian society intrinsically addressing the systemic issues of violence against Aboriginal women and girls and eradicating social, cultural, economic and spiritual inequalities encountered by Aboriginal women and girls in Canada.

Further, we would highlight the work of PCWM and others on Matrimonial Property law in Manitoba and Canada, (not applicable to reserves) and taken from our earlier Brief:

The lobbying of women's organizations was critically influential in bringing about changes to the marital property laws in the 1970's; among them, the Provincial Council of Women of Manitoba, the Manitoba Branch of the Canadian Federation of University Women and the Manitoba Action Committee on the Status of Women. The Provincial Council of Women of Manitoba cites today the contribution of Council member, June Menzies, whose tireless efforts to bring equality and just laws to Manitoba women are widely known and recognized with the Order of Canada. June has shared on many occasions, that `her awakening to the reality for women had been such a revelation to her that she naively thought that all one had to do was

¹ The entire Declaration is found at <http://newcamcnwac.blogspot.com/>

to tell those in authority what was wrong, and the necessary changes would be made." A Partnership of Equals, by Bernice Sisler, p.19.

The cruel inequalities imposed upon Mrs. Murdoch in the infamous 1973 Supreme Court of Canada Murdoch decision and thus upon all Canadian married women, followed shortly thereafter by the Saskatchewan Rathwell decision (a successful appeal in the Saskatchewan Court of Appeal was upheld in the Supreme Court of Canada) brought home to all Canadian women the stark reality that gender privilege enjoyed by men in marriage and society required more than raised awareness to displace it. When then Chief Justice Bora Laskin was later asked why he had sat only five justices to hear Murdoch, he replied that if he had been aware of the significance of the case at the time, he would have sat nine justices. He added that he was surprised to find himself in the minority when judgment was rendered three to two for Mr. Murdoch.

The outcome galvanized a sleeping Canadian population of women to whom it was a surprising revelation that it was virtually impossible to become entitled to a share in marital property by her 'expected contribution' of labour to the marriage because what Mrs. Murdoch did, according to Mr. Murdoch, was "just about what the ordinary rancher's wife does. Most of them can do just about anything." Sisler, p.40. Without a monetary contribution, no right to property could be established. In the Rathwell decision, a Saskatchewan farmer, Helen Rathwell, worked as did Irene Murdoch at all the farm chores and in addition contributed off-farm earnings to the household and farm expenses. The lower court denied her a share of the farm because her labour did not contribute to the assets and there was no evidence of an agreement to share ownership. This decision was overturned and a 'constructive trust' found by the higher courts. To deny Mrs. Rathwell her interests in the assets would result in the unjust enrichment of her husband. The Kowalchuk case was like the other two in that Mrs. Kowalchuk contributed substantial labours to the home and farm work but in addition she had brought two cows into the herd at the time of the marriage and her family had given two more. She was held entitled to half the assets, which sounded like progress but the significance to women was that it was not her marital status or devoted labours that did it but the four cows.

When women in Manitoba discovered that they were not equal partners in marriage, they were incensed because they were never told the law did not value women's contribution in marriage and Murdoch was erroneously decided in their view. If Murdoch held, it did not reflect the reality of marriage in 1973 and the law needed to be changed to reflect the real expectations of marrying couples in that era. The affected population did not need to be persuaded to change. The oppressors had to be forced to change the law.

After a massive and doggedly persistent lobby by hundreds of women in Manitoba, on July 21, 1978, an exhausted crew of six women who led the fight, watched in the gallery of the legislature in the wee hours of the morning as family laws were passed that substantially reflected equality of partners in marriage. For all who had been subjected to and bitten by the previous law it was too late but for the future, the very nature of marriage and the role of women in the family was changed forever.

Our advancement toward law reflecting justice and equality for women goes back to within living memory. Our shared experiences of patriarchal oppression may be instructive of the steps for others to take but the traditional law of Aboriginal people goes back hundreds of years before living memory. Injustices, including legal gender inequality on reserves and unconscionable expulsions and exclusions of women based on marital status, have been imposed on them and must be removed. Canadian women who shared the callousness of patriarchal property law may recommend gender equality and an equal division of marital property on reserves as a principle. As a nation however it may be that we have little to teach Aboriginal people about justice and equality.

NCWC and PCWM do not have the authority of specific approved policy resolutions regarding MRP on First Nations Reserves to support or oppose Bill S-2, however we can speak out about the need to work closely with the First Nations' women, NWAC, in terms of implementation and recognize it will be the communities that will need to comply. In order for them to do that, resources will need to be provided. Further, it is important to address the serious situation of violence against our Aboriginal sisters. Safety is an issue, as is housing. These must be addressed if Bill S-2 proceeds.

Comments and Observations

1. Since the original PCWM Brief, done in 2003, there has been considerable review, analysis, proposed legislation, consultation on the topic of Matrimonial Real Property (MRP). Unlike the situation that changed matrimonial real property and family laws for most Canadians back in the 70's, it is not clear that it is the First Nations' women who are agitating to see the regime proposed in Bill S-2 become law.
2. In 2007 Wendy Grant-John wrote in her Report of the Ministerial Representative Matrimonial Real Property Issues on Reserves:
From legal, financial, social and cultural perspectives, landholding and housing arrangements on reserves are diverse and very different and in many ways have no parallel off reserves.
Her report describes in detail the many forms of rights to use and occupation by Band Members of collectively owned reserve lands.
3. The words “**real property**” in the MRP designation refer to Certificates of Possession and Certificates of Occupation which is not an entirely accurate description, as reserve land is not individually owned (in fee simple) as off-reserve land is, and the rights contemplated can only deal with use and occupation of the home and the movable property (personal property) and not the land they sit on.
4. The issue of **Band Membership**, and Indian Status are extremely important, and determine the right to ‘matrimonial real property’ rights created in Bill S-2. We agree with the inclusion of statements that respect the inherent right to self government by First Nations communities. Possibly it could be stronger. NCWC and PCWM have consistently supported meaningful consultation and participation of First Nations peoples in the development of any changes in issues touching upon the inherent right of self governance in each autonomous community.
5. **Membership codes** are an issue - do all 633 First Nations have them? Are they current? Will a year be long enough to bring them up to date?
6. Adequate housing on reserves is a long standing issue, as well as access to safe shelters on reserves. The occurrence **of domestic violence** does generally seem to result with the woman leaving the reserve, due, in part, to the gendered membership rules and distribution of the right to use and occupation of land on which the matrimonial home sits, as well as the lack of safe alternative housing. We agree there must be protection for her, and the children, and access to housing. Access to the resources that will support and enforce this must be in place concurrently with the establishment of MRP rights for such spouses.
7. Although there is mention of **Certificate of Possession or a Certificate of Occupation**, there are very few First Nations in Manitoba with this basis of land use. It is the same for

those communities in Manitoba that are under the First Nations Land Management Act. There are apparently no records kept of Custom Allotments. Thus, for the most part in Manitoba, there is no reliable system in place for tracking real property on reserve. This is an issue for Peguis First Nation and likely many others.

Recommendations

1. Although we would prefer delaying the implementation of Bill S-2 until each First Nation has negotiated time to draft legislation, we know the period of time of 12 months is not realistic. Look at **extending the period of time** in order for Membership Codes to be brought up to date, as well as First Nations determining their own Matrimonial Property laws. There is a need to bring to each of Canada's 633 First Nations the information necessary for them to comply with this proposed legislation.
2. **Provide resources** for First Nations to carry on this work during the period of preparation.
3. Support **NWAC to be the Centre of Excellence** as outlined in the [Planned Support for Implementing the Matrimonial Real Property Legislation](#). NCWC recommends that NWAC be resourced to have the Centre of Excellence as it has the overall network and contact with the women and are aware of the issues resulting from the current structure. NWAC must be the Centre of Excellence as it will be able to act independently and for the benefit of the women, children and families. AMC Chiefs, in Assembly, have passed a resolution which states that Chiefs and Councils represent their citizens regardless of gender or residency.
4. The result of Bill S-2 must **be better protection for women and children**. It will come before provincial courts, and will be enforced by First Nations or provincial authorities. Resources to support this process and to enforce the resulting laws must be provided. The **development of education materials, and the resources necessary** to implement must be provided by the Federal Government in consultation with First Nations, and resourced, as part of its obligation to Canada's First Nations.

*The **National Council of Women of Canada** is a federation composed of Local Councils, Provincial Councils, as well as National, Provincial and Local Organizations. Founded in 1893, it was incorporated by an Act of Parliament in 1914 and has been designated by the Government of Canada as being of national historic significance for its role in Canadian women's history. For more information, consult our web site at www.ncwc.ca.*

*The **Provincial Council of Women of Manitoba** was formed in 1949 and has grown to represent some 32 Federate members, as well as many individual members and supporters. For more information, see <http://pcwmanitoba.ca/>*

NCWC Policy

Since 1997 the National Council of Women of Canada has adopted as policy and has urged the Government of Canada to Work with provincial and territorial governments and with aboriginal organizations and governing bodies to develop and fund more safe houses/shelters, on and off reserve, including programs and services that respect aboriginal culture and traditions, for aboriginal women and their children who are victims of family violence. Engage stakeholders to successfully address the underlying issues contributing to the high rate of family violence within the Aboriginal community, and to increase the capacity of Aboriginal women to break the cycle of family violence;

1. Collaborate with Provincial and Territorial governments and with aboriginal organizations and governing bodies, and to consult with civil society to develop anti-poverty legislation that includes a strategy to eliminate poverty by addressing the systemic barriers to full social participation by all Canadians and which contains accountability measures for government, in support of the UN Millennium Goals;
2. Provide more effective prenatal care for aboriginal women, as they are disproportionately affected by HIV/AIDS, so that their children are less likely to be born HIV+;
3. Study the *Report of the Royal Commission on Aboriginal Peoples* and undertake appropriate action using a conciliatory process to create a new and better relationship between the Government of Canada and Aboriginal Peoples;
4. Remove section 67 of the *Canadian Human Rights Act*ⁱ as quickly as possible and to draft an Aboriginal Human Rights Code in consultation with First Nations governments in compliance with the UN Human Rights Conventions;
5. Signⁱⁱ and Ratify the *UN Declaration on Rights of Indigenous Peoples*;
6. Establish a national comprehensive child care policy designed to facilitate the development of child care services and resources which would, *inter alia*, be sensitive to the particular cultural requirements of aboriginal and immigrant families;
7. Enter into partnership with Aboriginal communities and organizations to review and identify barriers to the use of Section 81 and 84 of the *Correctional and Conditional Release Act*ⁱⁱⁱ, and create and implement an action plan to encourage its use for Federally Sentenced Aboriginal Women. This partnership should include financial resources for those communities wishing to undertake the responsibility of assisting in the reintegration of Aboriginal women offenders; and Ensure that Federally Sentenced Aboriginal Women are fully aware of Sections 81 and 84 of the *Corrections and Conditional Release Act* and encouraged to apply under these sections

ⁱ This section was repealed in June 2008:

http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c21&Parl=39&Ses=2&source=library_prb

ⁱⁱ Canada has signed on as of November 2010 but has yet to ratify the declaration through domestic legislation or enforcement

ⁱⁱⁱ The sections on 'Aboriginal Offenders' are below and the Act can be found at: <http://www.canlii.org/en/ca/laws/stat/sc-1992-c-20/latest/sc-1992-c-20.html>

79. In sections 80 to 84,

“aboriginal”

« *autochtone* »

“aboriginal” means Indian, Inuit or Métis;

“aboriginal community”

« *collectivité autochtone* »

“aboriginal community” means a first nation, tribal council, band, community, organization or other group with a predominantly aboriginal leadership;

“correctional services”

« *services correctionnels* »

“Correctional services” means services or programs for offenders, including their care and custody.

Programs

80. Without limiting the generality of section 76, the Service shall provide programs designed particularly to address the needs of aboriginal offenders.

Agreements

81. (1) The Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services.

Scope of agreement

(2) Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-aboriginal offender.