

Brief to the

Standing Senate Committee on Human Rights

**Re: On-Reserve Matrimonial Real Property on the
Breakdown of a Marriage or Common Law Relationship
and the Policy Context in which they are Situated**

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A Federate Member of the National Council of Women of Canada
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Introduction

The Provincial Council of Women of Manitoba (PCWM) was pleased to learn that the Minister of Indian and Northern Affairs Canada has asked the Standing Senate Committee to consider and report on this very important topic. In the context of human rights, the matrimonial property rights for women on Reserves would appear to be close to nonexistent. What many fought for in other parts of the country not so long ago, and are fighting for in other parts of the world, is being fought for once again here in Canada, today, by our Aboriginal sisters. Our intention is not to speak for First Nations, but to bring forward the issues as we understand them, and to support their voices being heard.

There is little disagreement with conclusions regarding the injustices done to First Nations women. This has been reported by many knowledgeable people, both Aboriginal and non Aboriginal. The history of colonization, jurisdictional wrangles, the legislative framework - the Indian Act, Bill C-31 - there are many factors that have led to the deplorable situation that we find today. Even the UN in its recent CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) report was critical of Canada with respect to its treatment of First Nations women.

Balancing individual and community rights as it applies to First Nations will not be easy. Accepting responsibility for the complexities and structural discrimination of the Indian Act rests with the Federal Government and is an essential part of an approach that is respectful and recognizes the inherent rights of First Nations.

II. Background to the Provincial Council of Women of Manitoba, Inc.

Founded in 1949, the Provincial Council of Women of Manitoba (PCWM), is a volunteer, non-profit, non-partisan federation of provincially organized women's, and women and men's groups and individuals in the Province. We come together to act in the public interest, to improve the quality of life for women, children and society in Manitoba. A list of members is attached in Appendix A. PCWM is a federate of the National Council of Women of Canada (NCWC), founded in 1893, which in turn is a member of the International Council of Women. The NCWC and PCWM policies relating to aboriginal affairs and family law are listed in Appendix B. NCWC delivered a brief to the Royal Commission on Aboriginal Peoples, in Ottawa on October 4, 1993.

Over the years, PCWM has reached out to Aboriginal women through membership, friendship, mentoring, and through programs which build bridges between us. More recently, PCWM has been approached by women from six or seven reserves in Manitoba and Ontario. PCWM continues to support these women in matters affecting their safety, human rights and democracy.

From what we were told, PCWM saw the need for an emergency resolution, "Protection of Human Rights for Aboriginal Peoples in Canada". Based on the approval of this policy at the NCWC Annual Meeting in June 2002, NCWC and PCWM both delivered briefs to the House

of Commons Standing Committee on Aboriginal Affairs on Bill C-7, the First Nations Governance Act in Winnipeg, March 18 2003.

NCWC wrote to the Minister of Justice, Canada, to urge that, no matter what happens to Bill C-7, his Government must remove section 67 of the Canadian Human Rights Act so that Aboriginal peoples have the same protection as all other Canadians. The Councils also note that unlike the human rights codes of many other countries and a number of Canadian provinces, Canada's code does not include "political opinion, belief or conviction" as prohibited grounds of discrimination.

This May, PCWM assisted an Aboriginal woman to attend the Canadian Association of Statutory Human Rights Agencies conference in Winnipeg. Earlier, the woman ran unsuccessfully for Chief on her reserve. Allegedly, because of this challenge, she lost her job on the reserve and has since had to move to the city to seek employment.

A Brief History of the Women's Lobby for Gender Equality in Family Laws in Manitoba

The Royal Commission on the Status of Women (1970), Recommendation 107 states:

We recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources. P. 410

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 to tell those in authority what was wrong, and the necessary changes would be made." *A Partnership of Equals*, by Berenice 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 Boris 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 Rathwell, 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.

III. The Current Situation in Manitoba

There are sixty-two bands in Manitoba. The registered Indian population as of December 31, 2002 in Manitoba was 112,430 people with approximately 64% (72,000) living on reserve, higher than the 57% Canadian average living on-reserve. There is great diversity among Manitoba's bands, for example, different cultures, languages and histories. Population size on reserves ranges from 4,140 in Cross Lake to fewer than 100 people in each of three First Nations in Manitoba.

Aboriginal People in Manitoba, 2002, gives a description of the poverty, health, education and justice demographics for First Nations, non Status, Inuit, and Metis for Manitoba. The on-reserve median income was \$2,095 less than the median income of Status Indians in Winnipeg. The median income for non-Aboriginal women was \$14,238, or 57.5% of the median male income of \$24,751. Province-wide, the median Aboriginal female income is \$8,977 or 83.8% of the median male income of \$10,717. The low-income rate for Aboriginal single parent families, inside or outside Winnipeg is appalling. Provincially, 89.2% of off-reserve Status Indian single parents (and their children) fall below the LICO (Low-Income Cut-Off).

Through discussions with women and men living and working on reserve, some of the key legal issues affecting on-reserve matrimonial real property on-reserve which we have heard are:

! Section 6, Indian Act: Definition and Registration of Indians
- the Membership Issue for Women

Aboriginal and non-Aboriginal women from every part of Canada have eloquently described the blatant gender inequality of the membership issue, inequality that has been written right into the Indian Act.

! Section 20 - 29, Indian Act: Possession of Lands in Reserves
- but Few Certificates of Possession and No Records of Custom Allotment

According to INAC's data, there are 1,256 Certificates of Possession in all of the sixty-two First Nations in Manitoba. Of these 1,256 Certificates, Peguis with an on-reserve population of 3,120 has 1,073 and Waywayseecappo with 1,460 people an on-reserve has 107 Certificates registered with INAC. The remaining 76 Certificates belong to properties on eight other First Nations in southern Manitoba. 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.

! Section 81 (1)(i) and (p-2), Indian Act: Powers of the Council
- Band Politics

In working with men and women on-reserve, we have observed that housing allocation on a number of reserves is decided and implemented by Chief and Council. Housing policy which would guide the allocation of housing and a set of criteria for tenancy agreements is not always

written down or approved by or even shared with all the band members. A band election can mean a change in Chief and Council and a change in housing policy over night.

! Section 88 - 90, Indian Act: Legal Rights

- yet Massive Variation in Accessibility to Legal Services in Manitoba.

First Nations women do not have the same protection in law that other Canadian women have, upon marriage breakdown.

A. Under section 88 of the Indian Act and case law described in the Discussion Paper, provincial marital property legislation can apply on reserves. However, women's access to legal protection varies hugely - from the north - to the south of Manitoba - to Winnipeg. The physical distances and the terrain are such that it is prohibitive for Aboriginal women on many northern reserves to seek and obtain legal remedies. Island Lakes, for example, is home to four bands with a total on-reserve population of 7,600. It is spread over a 31,000 hectare area in northwest Manitoba near the Ontario border. There is a seasonal road, in the winter only, for the 14-hour drive to attend the Court of Queen's Bench in Winnipeg, the only court fixed by law capable of hearing disputes involving marital residences and their occupation. An airline ticket to Winnipeg costs \$400 return.

B. The administration of the courts in Manitoba is such that it is very difficult for a woman on reserve to secure legal remedies. It is a challenge for lawyers up north to meet the tight required filing deadlines in certain cases.

C. Legal Aid may be able to help a woman with child support and spousal support cases, but if property is involved, Legal Aid is not applicable as it is considered that there are assets from which the client will pay the lawyer. The majority of Aboriginal women simply cannot afford to hire a lawyer. Unenforceable legislation is of no help to on-reserve women and, arguably, works against them.

D. Women seeking help from Indian and Northern Affairs Canada are advised that matrimonial real property is a matter for the band to see to.

! Family violence

Family violence is a major cause for concern as it influences the decision to stay in the matrimonial home, especially when there are limited options and protection for women. Family violence contributes to the unfair and unequal role for First Nations women. Women experiencing family violence in their relationships are put at risk of further violence by the present gender preferences in land allocations in the absence of a form of equal division of property interests on breakdown of marriage. A woman who is granted sole possession by the court or who is permitted to live with her children in a home that has been allocated to her partner by the band is vulnerable because she risks losing possession of the home if she is forced to flee the violence to an undisclosed location off reserve temporarily. Abused women who would have to leave the home they live in or leave the reserve, if they separate are often forced to stay and tolerate abuse because they have no right to a viable alternative.

! Education about Housing/Real Property Ownership On-reserve is Needed

Lawyers who are asked to act for Aboriginal women and men on real property matters on-reserve have told us that their clients are often under the impression that their house belongs to them. They do not always know that "their house" was allotted to them by Band Chief and Council and is not owned by the clients because there is no formal ownership system in place. They are also unaware of Band Council policies and by-laws.

Gender Equality Analysis or Gender Based Analysis (GBA)

According to the Secretary of State, Status of Women, "The Government of Canada has adopted GBA as a government-wide undertaking.GBA is a tool that promotes a comprehensive, integrated concept of equality that is consistent with the Canadian Charter of Rights and Freedoms. It allows us to better understand social processes and to highlight the unique factors that affect women and girls differently from men and boys. It also helps us to develop equitable policies, programs and legislation that take into account the lives of women and men, girls and boys." .

Canadian women were proud indeed when, following the 1995 UN Conference, Canada announced in Federal Plan for Gender Equality (1995), that the Government of Canada was committed "to ensuring that all future legislation and policies include, where appropriate, an analysis of the potential for different impacts on women and men."

PCWM has been trying unsuccessfully since December 2002 to obtain a complete copy of INAC's gender equality analysis of Bill C-7, the First Nations Governance Act.

Marriage and Common-law Relationships

It is worth noting that, in 2002, the Manitoba Government assented to The Common-law Partners' Property and Related Amendments Act. This legislation amends a variety of Manitoba Acts extending the property rights and obligations of spouses to common-law partners, so that, on the breakdown of their relationship or on the death of one of the partners, common-law partners will be able to share the property accumulated during the relationship.

Case Study

On a reserve in Southern Manitoba, one woman is determined to keep the matrimonial real property on reserve for herself and her three children. Her common law husband was chief. He left the house saying, "You stay. I'll go". He moved to the city. A new Chief and Council were elected. The ex-husband, now in need of employment and cash, is trying through the courts to regain the matrimonial home. His efforts are being slowed by a sole-occupancy court order related to alleged spousal abuse. He is now doing everything possible to influence the current Band Chief and Council. A promised letter of support for her staying in the house from the Band Office was not forthcoming.

This woman lives with the worry that one day she will come back from her university classes

and find her house emptied or vandalized. As a girl and young woman she grew up moving from place to place. She very much wants to have a secure base for her young children. There is no Certificate of Possession, no identifiable housing policy. She refuses to sign a tenancy agreement on reserve and pay rent when nobody else does nor is she going to sign and risk eviction when she cannot pay. The ex-common law husband has an estranged, independent wife; other ex-common-law partners of various degrees of dependency (he built a house on-reserve for one common-law wife where she still resides) and twelve children. The demand for housing on the reserve far outstrips supply.

IV. Future Directions

1. Protection of Human Rights for Aboriginal People in Canada

The National Council of Women of Canada is urging the Government of Canada to remove section 67 of the Canadian Human Rights Act 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. (Appendix B). The Canadian Human Rights Commission needs, also, to have the capacity and resources to meet the high expectations that extending the legislation to Aboriginal peoples will bring.

The burden of repairing the gender discrimination in the Indian Act should not be left to be determined on a complaint under the Canadian Human Rights Act (CHRA), although such complaints should not be statute-barred in the event of a failure of the Federal Government or bands to provide adequate remedy and reparations.

In addition, we have heard many complaints that vital decisions are made on the basis of one's support for or opposition to the chief. Therefore, discrimination on the grounds of political belief should be prohibited under the CHRA. Unlike the human rights codes of many other countries and a number of Canadian provinces, the CHRA does not at this time include "political opinion, belief or conviction" as grounds for discrimination.

2. Membership Issues

There are many related topics that must be dealt with in the context of the lives of First Nations and the rights of First Nations women, such as the clear injustices from Bill C-31. The separation of Band Membership from Status registration and the new class of Bill C-31 6(2) are two such topics.

3. Land Registers of On Reserve Property

While both the Indian Act (s. 21) and the First Nations Land Management Act (s. 25) have provision for reserve land registers, a vacuum exists for 60 out of 62 bands in Manitoba. If a band's custom allotment system fails to secure matrimonial property rights, a comprehensive land register system for on reserve lands is essential even to begin to help women whose marriage or common-law relationship has come to an end.

4. Band Politics

Integral to any solution are Band Codes that provide certainty and fairness to land allocations, housing policies, tenancy agreements, etc. and that provide for marital property division on the breakdown of marriage and common-law relationships. All band codes need to be developed with the equal participation of Aboriginal women and with openly-arrived at and shared gender equality analysis of the band codes and the administration of band codes.

The definition of who is legally married (common-law; same sex; Aboriginal customary marriage) needs to be discussed and clarified for purposes of the application of Band regulations and codes.

The requirement for Rules on Breakdown of Marriage (s. 17) in the First Nations Land Management Act (FNLMA) is clearly a positive direction. The FNLMA requires each First Nation within the Framework Agreement, in consultation with the community, to "...establish 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.". In their discussion paper, Wendy Cornet and Allison Lendor describe some of the lessons learned from the application of the FNLMA. There are four bands which now have such codes.

5. Family violence

More housing and shelters on reserves would accommodate families suffering family break up and ease the tensions for women who are desperate to leave an abusive relationship. A marital property code should protect such women's homes and safety and that of the children.

Temporary housing for violent spouses is another possibility, provided the safety of victims comes first.

6. Gender Equality Analysis or Gender Based Analysis (GBA)

In 2002, the National Council of Women of Canada began urging the Government of Canada to pass enabling legislation to ensure that gender analysis is applied throughout the government in relation to all laws, policies and programmes, and that the reports on such gender analysis be made widely available to the general public.

Aboriginal women urgently need the federal Government and their band leaders to apply gender analysis openly and fully.

7. Community Education and Capacity Building On Reserve

Community education forums on matrimonial real property, particularly focused on youth Human Rights education, facilitated by community members, would raise awareness. Resources for education and focus groups, such as the Aboriginal Women's Round Table on Gender Equality

(March 30-April 1 2000) are necessary to come up with solutions. Not all women are the same. There are many different tribes, customs and territories for First Nations women, all with their own history, set of concerns and legal framework. But it is clear, that as First Nations people are moving towards self government, women must have the resources to be at the table too, to express their own unique point of view and to work for the benefit of their community. Special supports will have to be considered to cover their costs. Law making alone would not solve the problem, unless there is recognition that the current situation is not fair, right or just.

8. Accessible Legal Aid Services

First Nations women need uniform access to legal information and legal aid services, particularly when seeking an equal division of real property interests of the spouses or sole possession of the marital home. The provincial and federal governments need to review and improve Manitoba's legal administration and legal representation systems, founded on a Gender Based Analysis, to ensure that it is meeting the needs of First Nation women on reserves. Consider designing and separately funding a program specifically for the purpose of providing individual legal advice and representation to First Nations and educational initiatives on reserves.

Conclusion

PCWM has welcomed the opportunity to present a brief synopsis of our knowledge and concerns about the absence of equal marital property rights for women on reserves in Manitoba. We related our historical contribution to the passage of Manitoba's marital property laws in 1978, in the belief that our direct and pivotal experience may assist the cause of Aboriginal women's equality. This experience has been documented in Berenice Sisler's book, *A Partnership of Equals: The Struggle for the Reform of Family Law in Canada*.

We have related our direct contacts with Aboriginal women in Manitoba who have consulted us and to whom we have lent our support and assistance for their safety, democracy and human rights issues on reserves. In the process we have learned a great deal about our Aboriginal sisters with whom we share interests common to women living in patriarchal societies around the world. The appalling economic conditions of Canadian Aboriginal women in particular that were created under the Indian Act and prevail to this day, too often resemble life in impoverished third world countries. Poverty is a tragedy in poor countries. In a rich country like Canada it is a disgrace. We have identified contributing factors that are the responsibility of the Federal Government to repair. It is also the responsibility of all other Canadian Governments and all Canadians to actively promote a just outcome.

The balancing of collective band interests and individual concerns is never easy, yet principles of equity must be followed and the assessment of equality of the results must be made. At the present time, when assessing the equality of results, we must conclude that First Nations' women have few rights with respect to the occupation of the family home following family breakup. We urge this committee to listen to the stories from women who are living here in Canada under a very unfair system and consider changes that will give women the protection of rights that other Canadian women enjoy.

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Appendix A

Federate Members of the Provincial Council of Women of Manitoba, Inc. 2002-2003

- § Anglican Church: Women's Commissions Diocese of Rupertsland
- § Business & Professional Women's Clubs (Manitoba)
- § Federation of University Women Manitoba Council
- § Consumers Association of Canada (Manitoba) Inc.
- § Council of Women of Winnipeg
- § Elizabeth Fry Society of Manitoba
- § Federation of Medical Women of Canada of Manitoba
- § IKWE-Widdjiitiwi, Inc.
- § Immigrant Women's Association of Manitoba (IWAM)
- § Manitoba & NW Ontario Synodical Society, WMS, The Presbyterian Church in Canada
- § Manitoba Association of Home Economists (MAHE)
- § Manitoba Association of Women and the Law (MAWL)
- § Manitoba Association of Women's Shelters
- § Manitoba Child Care Association (MCCA)
- § Manitoba Dental Hygienists Association
- § Manitoba Women in Trades and Technology (MBWITT)
- § NDP Status of Women Committee
- § Original Women's Network
- § Reseau Organization de Femme
- § Salvation Army Women's Organizations MB. & W. Ontario Division
- § UN Platform for Action Committee (MB) UNPAC
- § Ukrainian Women's Association of Canada
- § Women's Health Clinic
- § Women's Health Research Foundation of Canada

Appendix B - Policies

National Council of Women of Canada Resolutions: (available on the www.ncwc.ca web site)

- 67.7 Disposition of Indian Lands
- 74.1 The Right to Status for Indian Women
- 74.6 Equity of Wife at Termination of Marriage by Divorce
- 93.4 New Programs for Native People
- 97.6 Towards a New Relationship Between Aboriginal Peoples and Other Canadians
- 98.1EM Economic Gender Equality Indicators and Gender Analysis

Protection of Human Rights of Aboriginal Peoples in Canada (2002)

WHEREAS Canada is a signatory of the UN Conventions on Human Rights (1966) [Political and Civil Rights, Economic and Social Rights] and the UN Convention on the Elimination of All Forms of Discrimination Against Women (1967); and

WHEREAS section 67 of The Canadian Human Rights Act (1978) specifically exempts from the protection of the Act, a large body of Indian Act matters which affect all Aboriginal Peoples but especially women's equality interests in governance on reserves; and

WHEREAS some First Nations women are in need of human rights protection in key areas addressed by the Canadian Human Rights Act such as employment and provision of services i.e. housing, health and education; therefore be it

RESOLVED that the National Council of Women of Canada adopt as policy the protection of the human rights of all Aboriginal peoples; and be it further

RESOLVED that the National Council of Women of Canada urge the Government of Canada to remove section 67 of the Canadian Human Rights Act 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.

Provincial Council of Women of Manitoba Resolutions: Family Law

PCWM (1979) urged that the following principles be reflected in the Marital Property Act and the Family Maintenance Act:

- 1) family home and assets must be owned equally by the couple during the marriage and not just on separation
- 2) there must be equal sharing of all assets during the marriage and no provision to allow a judge through judicial discretion to give more to one spouse than the other except in rare hardship cases
- 3) maintenance on separation must be based on need and fault must not be a consideration (reiterated from 1978 and 1976)

PCWM (1978) recommended the establishment of an integrated Family Court