



Filling the Gap: Family Law on First Nations Reserves

by Jodi L. Wyman

The Federal Government has finally taken steps to fix an unfair gap in family property law. It has introduced the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. It offers protection to separating spouses who live on First Nations reserves.

There has been a long-standing inconsistency in the law. Canadian couples living off reserves are protected by provincial laws that allow for an equal division of the family assets and the right to apply for exclusive occupation of the family home. Unfortunately, these provincial laws do not apply to couples who live on reserves, which are governed by the *Indian Act*. That Act is silent on the issue of marital property rights. As a result, a spouse could be left homeless and impoverished at the end of a marriage or common-law relationship.

For example, away from a reserve, there could be a marital home in the name of the husband alone. The wife can apply to the court for an order for exclusive occupation of the home, allowing her, and the children if she is also granted custody, to reside there

indefinitely. There was no such remedy available to a spouse who was living on a reserve.

Under the new Act, both spouses would have equal opportunity to occupy the family home after separation. An application for exclusive occupation could be made, and on an urgent basis if necessary.

The new Act has a set of rules for matrimonial real property, but it also allows for First Nations to develop their own matrimonial real property laws. The federal process set out in the Act is meant to fill the legislative gap on reserves until the First Nations develop their own laws for marital property.

Spouses in Manitoba are protected by the *Homestead Act*. Now, on reserves similar protections will apply. A spouse would have to provide consent before the family home could be sold or otherwise disposed of, regardless of whether or not that spouse or common-law partner is a First Nation member. Also, if the spouse who owns the home dies, the surviving spouse or common-law partner can remain in the home and can apply for half the value of the home (if they are not

left the home in a Will).

Spouses will be entitled to an equal division of the value of the family home on marital breakdown, and can ask the court to transfer the marital rights between spouses or common-law partners together with, or instead of, financial compensation.

This new Act applies to married couples and common-law partners, where at least one of them is a First Nation member or an Indian. Further, the definition of "common-law partner" in this Act is "a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year."

The rights and remedies in the new federal Act will apply in the usual provincial and territorial court systems, such as the Queen's Bench in Manitoba.

As is also the case off reserve, couples have the ability to contract out of their property rights by entering into a spousal agreement after having had the benefit of independent legal advice.