FAMILY LAW RELATING TO FIRST NATIONS CLIENTS

Marilyn Poitras
Box 21009
Saskatoon, SK  S7K 3J4
TABLE OF CONTENTS

I. INTRODUCTION ...............................................................................................................1

II. MARRIAGE AND DIVORCE............................................................................................3

III. CUSTODY OF AND ACCESS TO CHILDREN ...............................................................4

IV. FAMILY PROPERTY.........................................................................................................4
   A. INDIVIDUAL LAND-HOLDING ON RESERVE.......................................................4
   B. RESIDENCE ON RESERVE....................................................................................5
   C. FAMILY PROPERTY ON RESERVE .........................................................................6
      (a) Real Property on Reserve.........................................................................................6
      (b) Personal Property Located on Reserve.................................................................8

V. SPOUSAL AND CHILD SUPPORT ..................................................................................9
   A. TAXABLE AND NON-TAXABLE INCOMES...........................................................9
   B. OTHER INCOME SOURCES ..................................................................................12
   C. GARNISHMENT AND ENFORCEMENT OF MAINTENANCE ORDERS ..........12
I. INTRODUCTION

This paper will introduce the reader to basic aspects of family law relevant where one or both spouses or a child has status as an Indian under the Indian Act.\(^1\) The Indian Act sets up a system for holding interests in real property on Reserve; it does not address the division of such property when a marriage or common law relationship ends. In the constitutional division of powers, section 91(24) of the Constitution Act, 1867\(^2\) confers exclusive jurisdiction over “Indians, and Lands reserved for the Indians” to parliament. Note that there are two aspects of this category – one relating to persons and one relating to lands. In contrast, a province’s lawmaking authority derives from section 92(13) of the Constitution Act, 1867, namely its jurisdiction over “Property and Civil Rights in the Province”. Professor Hogg suggests this latter category includes matrimonial property issues, spousal and child support, adoption, guardianship, custody, legitimacy, affiliation and names.\(^3\) Once parliament passes laws under section 91(24), all provincial laws which are inconsistent with the federal law do not apply. The Indian Act contains several provisions addressing possession of interests in Reserve lands and limited immunity of certain real and personal property from seizure, as well as an exemption from income tax for income that meets criteria. These laws displace provincial laws such as parts of the Family Property Act\(^4\) and limit the authority of judges to handle these family law cases as they handle cases of non-Indian people.

The practice of family law for First Nations clients requires one to understand the distinctive interplay of federal and provincial laws in this legal context. Section 88 of the Indian Act referentially incorporates provincial laws of general application, including those which would not apply to Indians or Reserves of their own force.\(^5\)

---

\(^1\) Indian Act, R.S.C. 1985, c. I-5 as am.

\(^2\) 1867 30 & 31 Victoria, C. 3. (U.K.)

\(^3\) Peter W. Hogg, Constitutional Law of Canada, 2\(^{nd}\) ed., (Toronto: Carswell, 1985).


88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Section 88 also expresses that the doctrine of federal paramountcy applies where an incorporated law conflicts with a valid federal law, regulation or a Band bylaw. Also note that section 88 clarifies that a First Nation’s laws or by-laws will supercede a provincial law which is inconsistent with it.

In determining the precise legal matrix surrounding your client’s situation, it is important to check with the appropriate First Nation or Band government, to determine whether the First Nation has done any of the following:

(a) passed Band Council Resolutions under the authority of section 81(1) of the *Indian Act* which will affect your case;
(b) negotiated and implemented a Self-Governance Agreement, and thereunder passed laws respecting marriage rights or property rights;
(c) developed and implemented a land code under the *First Nations Land Management Act*;
(d) followed customary or traditional laws made by the First Nation under its constitutionally protected law-making authority.

In addition to the usual kinds of rights created in family law, under the *Indian Act*, all the statutory rights deriving from status as an Indian are transmitted to some offspring, under a technical but not complex set of rules.

---

7 The system created by section 6 of the *Indian Act* is currently being challenged as being unconstitutional. Across the system, cousins of equal Aboriginal ancestry may have status or lack status depending on whether their grandparent with status was female or male.
The first step in acting in any family law case involving a First Nations person is to confirm which of the spouses and children, if any, have status under the *Indian Act*. Where a First Nation controls and records its own membership rolls under section 10 of the *Indian Act*, the First Nation should be contacted to determine which parties are band members. In those instances, membership may not be identical to, or coextensive with, status under the *Indian Act*.

II. MARRIAGE AND DIVORCE

Marriages involving a status Indian can be formed and dissolved under the same provincial and federal laws that apply to non-status people. In addition, courts have recognized customary marriages and divorces.8

Membership in a First Nation does not automatically fall on one who marries a member. But divorce may end membership. For example, issues may arise where a First Nations person accepts membership in their new spouse’s First Nation and gives up membership in their original First Nation. Upon divorce, that second membership will also terminate, leaving the person without membership rights in any First Nation. These considerations should guide decisions in handling the timing of divorce.

III. CUSTODY OF AND ACCESS TO CHILDREN

Given the constitutional division of powers, generally, provincial laws in respect of custody and access apply to First Nations people and people on Reserve land. Exceptions will occur where a First Nation has taken control over, and made laws regarding, custody and access, such as under a Self-Government Agreement. In those cases the Agreement will stipulate which categories of the First Nation’s laws supercede provincial laws and which do not.9

IV. FAMILY PROPERTY

A. INDIVIDUAL LAND-HOLDING ON RESERVE

Section 20 of the Indian Act creates the system for members of a First Nation to hold interests in land. The Crown holds title to these lands, and the Minister of Indian Affairs has authority to grant the right to exclusive use and occupation of a parcel of land to a First Nations member. This interest is called exclusive possession and is evidenced by a Certificate of Possession. The person holding this interest may be called a locatee or a Certificate of Possession holder. Many First Nations do not use this system for individual land-holding, and instead use either a customary or an informal mechanism. Professor Douglas Sanders has estimated that fully half of First Nations in Canada do not use the Certificate of Possession system at all, while others combine Certificates of Possession with customary practices.10

Section 20 of the Indian Act does not allow non-members of a First Nation to hold a Certificate of Possession solely or with a member jointly. Rather, it contemplates that non-members can have

---

9 Please note that Saskatchewan legislation recognizes customary adoption – which practices are specific to each First Nation and which must be considered on a case by case basis.
exclusive occupation of Reserve land under leases pursuant to section 58(3). This creates an anomaly for non-member spouses living in their spouse or partner’s house held under a Certificate of Possession. The non-member spouse has no legal standing or capacity to hold an interest in the Certificate of Possession itself. The only way to create equal interests for member and non-member couples is for the Certificate of Possession holding spouse to lease the Certificate of Possession land to her/himself and her/his spouse jointly.11

For a helpful explanation of the legal categories of Reserve land and the kinds of interests one can hold in on-Reserve housing, see “Matrimonial Real Property Issues on Reserve”.12

B. RESIDENCE ON RESERVE

Membership in a First Nation does not confer an automatic or enforceable right to live on the Reserve. Band councils have the authority under section 81(1) of the Indian Act to make laws in relation to possession and occupancy of on-Reserve housing. Band councils are also responsible to allocate housing to members. In many instances across Canada, Reserves lack adequate housing for all members who want to live on Reserve. This shortage makes the laws regarding possession of on-Reserve matrimonial homes all the more important to clients.13

Residency rights of children of First Nations members derive from section 18.1:

A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody.

11 The British Columbia Supreme Court recently held that provincial family laws apply to leasehold interests in some Reserve lands under the exception created by section 89(1.1). See Dunstan v. Dunstan (2002), 100 B.C.L.R. (3d) 156 (B.C.S.C. In Chambers).
12 Wendy Cornet and Allison Lendor, “Matrimonial Real Property Issues on Reserve” (Gatineau: Women’s Issues and Gender Equality Directorate, Indian and Northern Affairs Canada, 2002) at 41-42.
Note that children of First Nations members have this right whether or not the children themselves have status or Band membership. The right arises where the parent or person with custody has, by a Certificate of Possession or lease, a legal right to live on Reserve.

C. MATRIMONIAL PROPERTY ON RESERVE

Parliament’s exclusive jurisdiction over “Indians, and Lands reserved for the Indians” alters the application of family laws relating to property located on Reserve, but does not change the application of those laws to property owned by a person with status when that property is located off Reserve.

(a) Real Property on Reserve

In two fundamentally important cases the Supreme Court of Canada found provincial laws in respect of division of family assets were inapplicable to family property located on Reserve. In Derrickson v. Derrickson, both spouses were members of the Westbank First Nation. Mrs. Derrickson brought a petition for divorce and applied for a one-half interest in the real property Mr. Derrickson held under Certificates of Possession. The latter claim was based on the provincial matrimonial property statute. The Supreme Court of Canada found that parliament’s legislation with regard to Certificates of Possession was within its exclusive legislative authority, and, therefore, the provincial law regarding real property rights upon the end of a marriage was inapplicable. Even considering section 88, the Court found it does not operate to incorporate the provincial matrimonial property laws because those laws are inconsistent with the Indian Act. Thus, to the extent they are inconsistent with the federal laws regarding Certificates of

---

14 The provincial Victims of Domestic Violence Act in Saskatchewan likely does not apply on Reserve unless it is adopted or enacted through a Band by-law or through legislation enacted under the inherent right of self-government.


16 Ibid. S.C.R. at 296 and 302.
Possession, the provincial laws do not apply. As a result, family court judges lack any lawful authority to make orders respecting allocation or disposition of a matrimonial home held on Reserve under a Certificate of Possession. In instances where there are other assets of significant value, as in Derrickson, the court should consider the possession of the matrimonial home on Reserve in its ultimate allocation and division of property between the spouses.17

In Paul v. Paul18 both spouses were members of the Tsatlip Indian Band. The husband held sole possession of the couple’s matrimonial home. Mrs. Paul sought an order for interim possession of the home. The Supreme Court of Canada determined that provincial family law could not form the basis of an order respecting possession of a family residence on Reserve. Again, the Court found the provincial legislation conflicted with validly enacted federal legislation, and therefore was inapplicable.19

Subsequently, courts have applied Derrickson and Paul to determine that even where spouses hold a Certificate of Possession jointly, a family court judge cannot, under the authority of provincial legislation, award exclusive possession of the matrimonial home.20

As a result of Derrickson and Paul, clearly provincial and territorial family law does not apply to matrimonial real property on Reserve. If a First Nation has a Self-Governance Agreement or exercises authority under the First Nations Land Management Act or under its inherent jurisdiction, issues will need to be determined under those specific provisions. Generally, under the Indian Act, that is, absent other legislation or agreement, only one remedy is available to address real property located on Reserve: an order for compensation, effective immediately or upon sale of the property. Typically, a court will determine the value of all matrimonial property,

---

both on-Reserve and off-Reserve, and order the spouse with property beyond its jurisdiction to
make an equalization payment to the other spouse. Depending on the financial circumstances, the
court may order the payment be made upon sale of the property. Perhaps, obviously, such orders
do not alter the ownership of the house or give the non-owning spouse an enforceable interest in
the house.

Further, courts have determined that some equitable remedies, such as constructive trust, are not
available in these kinds of situations.21

(b) Personal Property located on-Reserve

Given that exclusive federal jurisdiction is limited to “Lands reserved for the Indians”, that is,
real property, family courts have authority to divide on-Reserve personal property between
spouses. In Baptiste v. Baptiste22 the Court divided personal property located on-Reserve, and
left resolution of the claims to real property aside, to be resolved through the Band.

Enforcement of such orders is a different matter. Section 89(1) of the Indian Act provides:

89.(1) Subject to this Act, the real and personal property of an Indian or a band situated
on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress
or execution in favour or at the instance of any person other than an Indian or a band.

Section 89 exempts First Nations members’ real and personal property from several enforcement
mechanisms, which affects the ability of some spouses to enforce orders for spousal or child
support or for division of assets. Specifically, section 89 prevents a spouse who is not a member
of the First Nation from enforcing a judgment against on-Reserve property of a member.
Spouses who are members of any First Nation have capacity to enforce these debts, however.
For example, in Bellegarde v. Walker23 the Saskatchewan Court of Queen’s Bench held the

Gen. Div.).


provincial *Enforcement of Maintenance Orders Act* is a law of general application that does not affect “Indianness” and therefore applies to on-Reserve property. The Court permitted the ex-spouse and First Nations member to garnishee the on-Reserve assets of the other ex-spouse. This puts non-member ex-spouses at a distinct disadvantage relative to ex-spouses who are members of a First Nation. As long as the ex-spouse who owes money or other personal property keeps that property on Reserve, the non-Indian ex-spouse cannot enforce an order against those assets. As with the consequences of *Derrickson* and *Paul*, courts may compensate the spouse with property off-Reserve, but remain powerless to effect an actual division of on-Reserve property where one spouse is not a member of a First Nation.

**V. SPOUSAL AND CHILD SUPPORT**

**A. TAXABLE AND NON-TAXABLE INCOMES**

Spousal and child support orders are based, at least in part, on the incomes of both spouses/parents. In the case of spousal support, the amount of support is determined on the basis of the condition, needs, means and circumstances of each of the spouses,\(^\text{24}\) which includes a determination of the incomes of each of the spouses. This is the same basis for determining child support in the case of an adult child who is attending an educational institution (or who is otherwise unable to provide for the necessaries of life) where the court has determined that the Table amounts contained in the *Federal Child Support Guidelines* are not appropriate.\(^\text{25}\) The relative incomes of both parents are also used to determine how much each of them will be required to contribute to the cost of special expenses under section 7 of the *Guidelines*.

The Tables for child support that are contained in the *Federal Child Support Guidelines* identify monthly payments to be made based on the paying parent’s gross income. The Tables assume

---

\(^{24}\) *Divorce Act*, section 15.2(4).

that all incomes are taxable, so that the amounts to be paid as child support are determined on the basis that deductions for income tax will be made from the income identified.

The income of status Indians is in some cases tax exempt.\(^{26}\) In these cases, it may be necessary to impute income to arrive at an income amount that can be compared to a taxable income (where one spouse or parent has a taxable income and one does not) or to enable the Tables to be used to determine the amount of child support (since the Tables are based on taxable incomes).

Section 19(1)(b) of the *Guidelines* provides as follows:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(b) the spouse is exempt from paying federal or provincial income tax.

The courts have regularly relied on section 19(1)(b) of the *Guidelines* to “gross up” the non-taxable income to reflect an approximately equivalent amount of taxable income so that the decisions made based on the relative incomes will be fair, as stated by Fraser, C.J.A. in *Dahlgren v. Hodgson*:

The guidelines are premised on division of financial responsibility based on gross before tax income. Therefore, to properly apportion that responsibility for child support between the parents, the same foundation must be used. In this regard, it would be wrong to equate non-taxable income in the hands of one parent with taxable income in the hands of the other without the appropriate gross-up.\(^{27}\)

\(^{26}\) Section 87 of the *Indian Act* provides that the personal property of an Indian situated on Reserve is not subject to taxation. In appropriate circumstances, this will apply to exempt income of an Indian from income tax. The purpose of this paper is not to explore the situations in which the income of an Indian is not taxable; it is, rather, intended to make the point that the income of a status Indian may be exempt and, if it is, certain considerations must be taken into account when assessing spousal and child support issues.

Section 19(1)(b) has been used specifically to “gross up” the income of registered Indians exempt from paying income taxes.\(^{28}\) To do otherwise would be to defeat one of the primary objectives of the Guidelines, that is, “to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation”.\(^{29}\)

The argument has been made that the process of grossing up for taxes is an interference with constitutionally protected Treaty rights of Indians, but the courts have not accepted that any interference with those rights results from grossing up income to enable an appropriate support order to be made.

The amount by which non-taxable income should be grossed up is determined by the amount of taxable income that would have resulted in an after tax income equivalent to the amount received. The following extract from Merasty v. Merasty, a relatively recent Saskatchewan decision, indicates the approach that the courts are likely to take to this exercise:

The respondent's gross annual salary is $41,700 which must be adjusted in accordance with s. 1(g) of Schedule III of the Guidelines to deduct union dues of $413 annually. This results in an adjusted income of $41,287. The applicant, relying on Ninham, supra, suggests that this amount be "grossed up" by a conversion factor of 1.7, resulting in a total income of approximately $70,000. That approach, however, is not particularly accurate, nor does it reflect the difference in provincial taxation between the two jurisdictions. ChildView, Version 2000.1.0, by Evan K. Chan & Barry R. Gardiner indicates that a Saskatchewan resident would need to earn income at a level of $61,996 to achieve an after-tax income of $41,287. This presumes an effective tax rate of 33.40% and combined federal and provincial taxes of $20,709, an amount which I impute to the respondent pursuant to s. 19(1)(b) of the Guidelines. Accordingly, I find the respondent's annual income for the purposes of payment of child support to be $61,996.\(^{30}\)

---


\(^{29}\) Section 1(a).

\(^{30}\) Supra, at para. 5.
Once the taxable income is converted into an income before taxes, assuming tax would have been payable, the Table amounts may be utilized and comparisons between incomes can be made, so that appropriate proportions of special expenses can be allocated to each parent and fair support orders can be made.

B. OTHER INCOME SOURCES

In some cases, persons who are members of a First Nation may be entitled to support payments of various kinds. These amounts are taken into account in cases of spousal and child support as income to the individual who benefits from them. Where children benefit from such payments it may result in a reduced obligation to pay support being placed on the parent, or, if payments are substantial, they may result in an adult child having sufficient means to provide for his or her needs even though attending an educational institution. The rules in such cases about determining levels of support to be provided are not different from the rules in cases involving non-Indians.

C GARNISHMENT AND ENFORCEMENT OF MAINTENANCE ORDERS

First Nations people are not subject to provincial laws that can be described as “intimately bound up with the essential capacities and rights inherent in Indian status”. Such laws fall within the jurisdiction of the federal government under section 91(24) of the Constitution Act, 1867. However, provincial laws of general application that do not affect this essential nature do apply. The Saskatchewan Court of Queen’s Bench in Bellegarde v. Walker held that the provincial Enforcement of Maintenance Orders Act is a law of general application that does not affect “Indianness” and therefore applies to them as a matter of provincial jurisdiction.

However, section 89 of the *Indian Act* provides that the property of an Indian situated on a Reserve cannot be attached, unless the garnishor is an Indian or a Band. In *Bellegarde v. Walker* the garnishor ex-spouse was also an Indian so the garnishee was possible. This would also be the case where the person being garnisheed has property that is not situated on Reserve and that is therefore subject to attachment.