Divorce and Division of Property on Aboriginal Reserves

When a marriage ends in separation or divorce, provincial family laws provide a formula for dividing the family property.[1] Specifically, section 92(13) of the Constitution Act, 1867 gives the province the power to make laws concerning "Property and Civil Rights in the Province." However, section 91(24) grants the federal government authority over "Indians and Land reserved for Indians." [3] Essentially, "no federal or provincial law applies on-reserve to protect a spouse's real property rights." [4] This means that provincial family laws (which provide for the fair division of property upon marriage breakdown) are severely limited for Aboriginal women who have property on a reserve. [5] These women (and their children) are suffering due to this legal gap.

The courts have treated the lack of legislation for on-reserve property as a "constitutional division of power issue", a question of whether the federal or provincial government has authority. [6] A further constitutional issue is that of "equality and fairness for Aboriginal women." [7] The Charter ensures equality between men and women (sections 15 and 28), and the Constitution Act, 1982 clarifies that this equality is to extend to Aboriginal and treaty rights [section 35(4)]. However, since the federal government has not addressed how on-reserve property of a marriage or common-law relationship should be divided, it seems as though the equality rights of Aboriginal peoples living on a reserve are being compromised, as they are being treated differently than other Canadians. [8] Derrickson v. Derrickson

Despite the lack of legislation, Aboriginal women are not completely ignored when it comes to on-reserve matrimonial property distribution. In Derrickson v. Derrickson,[9] the Supreme Court of Canada (SCC) dealt with a divorce between a husband and wife of the Westbank Indian Band. The husband was entitled to certain portions of reserve land (he held Certificates of Possession and the wife sought half of this interest).

British Columbia's Family Relations Act [10] allows the transfer, sharing, or sale of the marriage property to ensure a fair distribution. [11] But the Court determined that this Act did not apply "to the right to possession of lands on an Indian reserve," because this is "the very essence of the federal exclusive legislative power under 91(24) of the Constitution Act, 1867." [12] Provincial legislation such as the Family Relations Act deals with the division of land, but not land located on a reserve. [13]

Despite this limitation, the SCC agreed with the B.C. Court of Appeal's decision to provide financial compensation to Aboriginal women "for the purpose of adjusting the division" of assets.[14] Specifically, the SCC held that section 52 of the Family Relations Act allows a "compensation order" where the land exists but cannot be divided because it is on a reserve.[15] Often with a compensation order, the spouse in possession of the land is instructed to pay cash to the other spouse. [16]

Despite a court's ability to order compensation, there is still a lack of legislation to ensure fair division of matrimonial property located on a reserve. This means that those living on a reserve are given less legal protection than other Canadians. "Aboriginal women cannot rely on the significant advancements made in provincial law that ensure equal and fair treatment of the female spouse's contribution to the marriage." [17] The Standing Senate Committee on Human Rights recognised that the lack of legislation is "not acceptable, against the Canadian Charter of Rights and Freedoms, and probably not consistent with our international obligations." [18] The government began consulting with Aboriginal groups led by the Native Women's Association of Canada in the fall. They plan on introducing a law in spring 2007 that protects the property of Aboriginal women in the event of separation or divorce although critics are left wondering about how this law will be enforced on First Nations reserves.

[1] Shin Imai, Aboriginal Law Handbook, 2nd Edition (Scarborough: Thomson Canada Limited, 1999) at 221.
[2] Constitution Act, 1867, s. 92(13).
[3]Supra note 2 at s. 91(24).
[4] Standing Senate Committee on Human Rights, "On-Reserve Matrimonial Real Property: Still Waiting" Fourth Report, Library of Parliament (December 2004) Online: Senate of Canada: Standing Committee on Human Rights http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04dec04-e.htm
[5] Shin Imai, Aboriginal Law Handbook, 2nd Edition (Scarborough: Thomson Canada Limited, 1999) at 221.
[6] Thomas Isaac, Aboriginal Law: Commentary, Cases and Materials, Third Edition (Saskatoon: Purich Publishing, 2004) at 513.
[7] Ibid.
[8] Supra note 5.
[9] Derrickson v. Derrickson, [1986] 1 S.C.R. 285. Online: CanLIIhttp://www.canlii.org/ca/cas/scc/1986/1986scc17.html.
[10]Family Relations Act, R.S.B.C. 1979, c.121.
[11] Supra note 12 at para. 30-40.
[12] Ibid. at para. 46.
[13] Ibid. at para. 48.
[14] Ibid. at para. 87. And the Family Relations Act, R.S.B.C. 1979, c.121 s. 52(2)(c).
[15] Ibid. at para. 91-93.
[16] Supra note 3 at 222.
[17] Supra note 7 at 513.
[18] Supra note 5.