Family Law Matters
Involving Aboriginal Peoples

Introduction

The Indian Act defines who is an “Indian” and establishes a Registry to record qualified individuals. Inuit and Métis do not fall under the jurisdiction of the Indian Act, even though they fall within the jurisdiction of the Federal Government pursuant to the Constitution Act.

The Constitution Act, 1867 gives the Federal Government exclusive jurisdiction under section 91(24) over “Indians and lands reserved for Indians”. Pursuant to this power, Canada enacted the Indian Act in 1876, which has continued in force until the present day and sets out certain laws that apply to Indians and reserve lands.

The Indian Act covers subject matters including: Indian registration and Band membership; reserve lands; wills and estates of Indians; taxation and exemption from seizure of property on reserve; and election and bylaws of Band Councils.

The Indian Act does not cover subject matters such as: social services, health, education, housing, policing, etc. Because the Indian Act does not cover these areas, Provincial laws fill in some of the gaps.

The following six sections are meant to provide some insight into the interplay of Family Law issues involving Aboriginal Peoples.

Division of Matrimonial Property

“Matrimonial property” is any property or assets either spouse owns or obtains before or during the marriage. It does not matter whose name the property is in because the presumption at law is that matrimonial property will be split 50/50 upon separation.

Provincial statutes such as Nova Scotia’s Matrimonial Property Act do not apply when it comes to dividing ownership or possession of on-reserve matrimonial property. Because the Matrimonial Property Act doesn’t apply
to property on-reserve, a legislative gap was created that affected everyone living on reserves, particularly women and children.¹

In response to this legislative gap, in 2013 Canada passed *The Family Homes on Reserves or Matrimonial Interests or Rights Act*, which covers matrimonial property on-reserve. This Act ensures that people living on reserves have similar protections and rights as other Canadians, such as the ability to request exclusive occupancy of the family home and division of the value of matrimonial property. The legislation also includes a mechanism for First Nations to enact community-specific matrimonial property laws, as well as provisional federal rules for matrimonial property protections and rights on reserves to be applied in the absence of a First Nation's own law. The Act will apply until a First Nation develops its own matrimonial property law under the legislation.²

Therefore, the first step in determining what law applies in regard to the division of on-reserve matrimonial property is to determine whether the First Nation in question has created its own matrimonial property laws under the Act, and if the answer is “no”, then the provisional rules under *The Family Homes on Reserves or Matrimonial Interests Rights Act* apply.

**Support Orders**

Under the *Child Support Guidelines*, the amount of child support is based on the gross income (income before tax or deductions), of the paying parent.

The difference in dealing with registered Indians under the *Indian Act* in relation to child support has to do with section 19(1)(a) under the *Child Support Guidelines* which allows a court to “impute” or increase an income to a spouse as it considers appropriate, including where the parent is exempt from paying Federal or Provincial taxes. This section of the *Guidelines* has been applied to increase the income of status Indians earning income, which is exempt from Income Tax, to determine the amount of support payable.³

**Enforcement of Support Orders**

Many provinces across Canada have their own “maintenance enforcement” programs. The purpose of such programs is to enforce support Orders

---

¹ Naomi Metallic, “Aboriginal Peoples of Canada” Aboriginal Content for Bar Course, pg. 3.
² Aboriginal Affairs and Northern Development Canada, online: [http://www.aadnc-aandc.gc.ca/eng/1100100032553/1100100032557](http://www.aadnc-aandc.gc.ca/eng/1100100032553/1100100032557)
³ Naomi Metallic, “Aboriginal Peoples of Canada” Aboriginal Content for Bar Course, pg. 4.
issued by the courts. In Nova Scotia, the Maintenance Enforcement Program (MEP) collects court-ordered spousal and child support payments.4

The payor (the person required to provide support) sends payments to the Program. The Program forwards funds to the recipient.5

In the cases where payments are not up-to-date, MEP can take action to enforce payment. Enforcement actions are determined by the Enforcement Officer (EO) based on the circumstances of each case. If the payor is behind in support payments and does not make a voluntary arrangement with the EO for payment, the payor’s income may be garnished or “legally seized” from sources such as an employer or a government agency. This money garnished from the payor is sent to MEP for maintenance payments and is then given to the recipient.6

Under section 89 of the Indian Act, registered Indians are exempt from the garnishment or seizure by non-Indians of property located on reserve. Property includes bank accounts and income located on-reserve. In cases where the dispute over child or spousal support is between two registered Indians, the garnishment of property or income earned by the Indian payor may be valid. In cases where the recipient is attempting to enforce a Court Order for support and the recipient is not a registered Indian, the Indian payor may be exempt from garnishment for property located on a reserve and the non-Aboriginal recipient may have to look for alternative ways to enforce the support Order.7

Customary Adoption

Customary adoption, also known as custom, cultural, or traditional adoption, refers to a privately-arranged adoption between two families within the Aboriginal community. Customary adoption is an open process that typically involves the birth parents, extended family, and the Aboriginal community.

The goal of Aboriginal customary adoption is to ensure Aboriginal children are raised in Aboriginal families so that they retain their language and culture.8

Customary adoptions do not require the same administrative procedures as statutory adoptions and are recognized as legal so long as the adoption

---

4 Nova Scotia Maintenance Enforcement Program, online: http://novascotia.ca/just/mep/
5 Ibid.
6 Ibid.
7 Naomi Metallic, “Aboriginal Peoples of Canada” Aboriginal Content for Bar Course, pg. 4.
8 Adopting in Canada: Aboriginal Custom Adoption and Kingship and Step-parent, online: http://www.adoptiveparents.ca/adopt101_typesofadoption4.shtml
meets criteria set forth in the particular Province or Territory. In most cases, there are no lawyers or social workers involved in these adoptions.⁹ Not all Provinces offer customary adoptions, primarily because each Aboriginal community has its own cultural practices in this regard and, therefore, a practice which is recognized in one community cannot be applied to all Aboriginal communities uniformly.¹⁰

**Child Custody**

In cases involving custody, adoption, apprehension and placement of children, the overriding concern of the Court is the “best interests” of the child. In determining the best interests of an Aboriginal child, the Court recognizes the preservation of a child’s cultural, linguistic, religious and spiritual upbringing and heritage.¹¹

**Child Welfare**

According to Statistics Canada, the *2011 National Household Survey: Aboriginal Peoples in Canada*, of the roughly 30,000 children aged 14 and under in Canada who were in foster care, nearly half (48.1%) were Aboriginal children. In 2011, 14,225 or 3.6% of Aboriginal children were foster children, compared with 0.3% of non-Aboriginal children.¹²

Provinces are responsible for delegating the authority for dealing with child protection matters. Non-Aboriginal child protection matters are litigated by the Minister of Community Services. Whereas, the Mi’kmaq of Nova Scotia, as status Indians, have their own private child protection agency, established in 1985, called “Mi’kmaw Family and Children’s Services”.

The mission statement of Mi’kmaw Family and Children’s Services is as follows:

>To develop and nurture a meaningful and culturally relevant delivery of family support to Mi’kmaw Families; to empower Mi’kmaw families by recognizing the role of parents and caregivers is to raise children who become productive, responsible adults, having strong sense of worth. Recognize and respect the importance of traditional teachings, which say that children are gifts from the creator. Acknowledge that all members of a community are responsible in creating and sustaining a

---

⁹ Ibid.


¹¹ *Maintenance and Custody Act*. R.S., c. 160, s.1; 2000, c.29, s.18(6)(e).

healthy environment for our Mi’kmaw children based on mutual trust and respect.

Mi’kmaw Family and Children’s Services hires its own social workers and applies their own culturally relevant standards.

Disclaimer: This site contains general legal information for residents of Nova Scotia, Canada. It is not intended to be used as legal advice for a specific legal problem.