FINDING SOLUTIONS FOR THE LEGISLATIVE GAPS IN DETERMINING RIGHTS TO THE FAMILY HOME ON COLONIALLY DEFINED INDIGENOUS LANDS

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I. INTRODUCTION

In Canada and Aotearoa New Zealand, lines similarly appear on the land categorising land in Canada as Indian reserves and in Aotearoa New Zealand as Māori freehold land. In both countries a special legislative regime based on ancestral heritage governs legal rights in this land: in Canada, it is the 1985 Indian Act; and in Aotearoa New Zealand, it is the Te Ture Whenua Māori/Māori Land Act 1993. Essentially, these lands are inalienable and blood links determine succession.† In both countries a fraught issue has arisen: what ought to happen if the family home is positioned on such land and the couple seek to separate or divorce, or the land-owning spouse or partner dies. That is, what legal right should the non-owning spouse

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† In Canada, the land in an Indian reserve is vested in the federal Crown, with individual band members permitted to hold certificates of possession. A devise or descent of such land must be made to those persons who have a right to reside on the reserve (see Indian Act, R.S.C. 1985, c. 1-5, s. 50(1) [Indian Act]). In Aotearoa New Zealand Māori freehold land is often owned in common, with a certificate of title attached to it. A devise of an interest in Māori freehold land will be deemed valid only if it is to a person or persons who fall into a certain category that includes children and blood relations (see Te Ture Whenua Māori Act 1993/Māori Land Act 1993 (N.Z.), 1993/4, s. 108 [Māori Land Act]). On intestacy, the interest is divided equally between the children (see Māori Land Act, s. 109). For more discussion see Part II below.
or partner have to the family home? If the house had been affixed to
general land, the answer would most likely have been a half share. But
the rules that apply to family homes affixed to Indian reserves
and Māori freehold land have developed in a distinctly different
manner to the rules that apply to general land. In Canada the judicial
answer has been no rights, although these rights are on the cusp of
becoming extensive. In Aotearoa New Zealand, the legislative
answer oscillates between no rights and at most a life interest right
dependent on whether the relationship ceased because of separation
or death.

In Canada the avenue to the answer of ‘no rights’ has been via a
legislative gap: federal legislation which governs Indian reserves,
namely the Indian Act, is silent on matrimonial real property law
because property is a provincial and territorial jurisdictional issue
and the courts have declared such legislation inapplicable on Indian
reserves. While the gap had been judicially acknowledged for some
years, it was not until early 2008 that the federal government
proposed a solution in the form of the Family Homes on Reserves
and Matrimonial Interests or Rights Bill, or Bill C-47 (the “Bill”). In
March 2008 the Bill received its first reading in the House of
Commons. The Bill proposes a new regime where First Nations will

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2 See in Canada: Matrimonial Property Act, R.S.A 2000, c. M-8; Family Relations
Act, R.S.B.C. 1996, c. 128; Family Property Act, R.S.M. 1987, c. M45, C.C.S.M.
c. F25; Matrimonial Property Act, S.N.B. 1980, c. M-1.1; Family Law Act, R.S.N.L.
1990, c. F-2; Matrimonial Property Act, R.S.N.S. 1989, c. 275; Family Law Act
(Nunavut), S.N.W.T. 1997, c. 18; Family Law Act, S.N.W.T. 1997, c. 18; Family
Law Act, R.S.O. 1990, c. F.3; Family Law Act, R.S.P.E.I. 1998, c. F-2.1; Civil
Code of Quebec, S.Q. 1991, c. 64, Book II: ‘The Family’; c.64; Family Property
See in Aotearoa New Zealand, Property (Relationships) Act 1976 (N.Z.),
1976/166 [Property (Relationships) Act 1976] (Aotearoa New Zealand is a
unicameral country. To better appreciate the constitutional differences see
Rev. 565; Matthew S.R. Palmer, “Constitutional Realism about Constitutional
Protection: Indigenous Rights under a Judicialized and a Politicized Constitution”

3 See Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3., s. 91(4), reprinted in

4 Bill C-47, Family Homes on Reserves and Matrimonial Interests or Rights Act,
2008) [Bill C-47]. Other related significant material can be viewed on the
Department of Indian Affairs and Northern Development website for on-reserve
matrimonial real property: Indian and Northern Affairs Canada, On-reserve
be permitted to create and apply their own laws, and only if no First Nation’s law has been verified will new federal law become applicable. The default federal law proposes the possibility of extensive rights in the form of exclusive occupation orders in favour of “a spouse or common-law partner … whether or not that person is a First Nation member or an Indian”.

In Aotearoa New Zealand, the answer of ‘no rights’ comes from a legislative gap in that the Property (Relationships) Act 1976, which exempts its equal sharing regime from Māori freehold land in favour of the Māori Land Act, but the Māori Land Act is silent on the consequences of real property rights following a relationship breakdown. The family home is subsumed into the definition of Māori freehold land due to the common law maxim that deems all property attached to land to be land: quicquid plantatur solo, solo credit—whatever is affixed to the soil, belongs to the soil. While the Māori Land Act contemplates a surviving spouse or de facto or civil union partner acquiring at most a life interest in Māori freehold land (and thus a life interest in the family home attached to it), it is silent on spousal and partners’ rights to such land following a separation or divorce. This legislative gap remains unacknowledged by the judiciary and Parliament.

Matrimonial Real Property, online: Indian and Northern Affairs Canada <http://www.aicn-inac.gc.ca/wige/mrp/index-eng.asp>.

5 Bill C-47, supra note 4, cl. 25(1). In Canada, the term spouse relates to legally married couples (as is also true in Aotearoa New Zealand), and the term common-law partner concerns a couple living in a conjugal relationship for at least 12 continuous months or earlier where they have had a child together.


7 In Aotearoa New Zealand, a de facto relationship usually gives rise to property rights only after 3 years’ duration (subject to some limited exceptions), and a civil union is one that has been formalised pursuant to the Civil Union Act 2004, (N.Z.), 2004/102 [Civil Union Act] and has the same legal status as a marriage. Note that a same-sex couple can constitute a de facto relationship or opt to enter into a civil union, but not marry. Also note that these rules were clarified and extended in 2001 following the passing of the Property (Relationships) Amendment Act 2001 (N.Z.), 2001/05 and the later Relationships (Statutory References) Act 2005 (N.Z.), 2005/03.
This article seeks to focus on the development of these legislative gaps and explore the solutions sought to fill them. It is structured in a theoretical context based on better understanding decolonisation, and, in particular, what ought to be the appropriate interplay between state law and Indigenous law in the 21st century. By way of background, Indigenous peoples—defined here as those peoples who have been subjected to European colonial settlement, and who continue to have an identity distinct from the dominant society in which they are encased and a concern for the preservation and replication of their culture— are seeking rights to reassert their own ways of knowing in determining the present and futures of their own peoples. These quests for self-determination pose interesting and challenging issues for colonial states. As part of this new world order, many state legal systems are attempting to replace assimilationist visions with more respectful aspirations with Indigenous peoples.

The Aboriginal peoples of Canada (constituting the First Nations, Inuit and Métis) and the Māori tribes of Aotearoa New Zealand all have their own languages, laws and customs. The intricacies of


9 See in Canada Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1) [Constitution Act, 1982] which recognises a constitutional commitment to “recognise and affirm existing Aboriginal and treaty rights”. In Aotearoa New Zealand, Parliament is supreme (thus there is no like Constitution as in Canada). Since the mid-1980s, Parliament has occasionally inserted into new statutes a direction that decision makers must have some level of regard to the principles of the Treaty of Waitangi (a document signed between the British Crown and Māori tribes in 1840). See Treaty of Waitangi, as enacted by the Treaty of Waitangi Act 1975, (N.Z.), 1975/144, 33 R.S. 907 [Treaty of Waitangi]. See Part III of this article.

these distinct nations have their histories embedded in thousands of years of development. While the forces of colonisation, the general technological modernisation of the world, and globalisation have drastically changed the realities of these Indigenous nations, Indigenous peoples remain committed to preserving their own identities, and adapting their ancestral ways to make sense of the modern world. For many of these Indigenous communities, self-determination, in whatever form they each define it, is the end goal. For some, the vision might simply mean knowing that their ways of doing things are respected within a dominant colonial regime, and for others it might mean regaining total separate control of their own destinies.

By focusing on a ground-level issue—the family home—this article will hold value for all countries currently pursuing reconciliation with their Indigenous peoples. It is not an issue peculiar to Canada or Aotearoa New Zealand. For example, in the United States, the Harvard project on American Indian Economic Development has done some initial work on highlighting the issue as confronted in “Indian Country”. The Harvard Project case studied the legal regime applicable to the Navajo Nation (decisions may be governed by formal tribal law), the Hopi Tribe (decisions may be governed at least partially by informal/customary tribal law), the Luiseno Indian nations of California (decisions may be governed by state law), and the Native Village of Barrow, Alaska (it may be unclear which legal regime and rules apply). This article aspires to be of comparative relevance for all Indigenous peoples and colonial states seeking decolonised solutions to determining rights to the

in New Zealand Law (Wellington, N.Z.: Law Commission, 2001) [Māori Custom and Values].


family home on Indigenous lands. The choice to contrast Canada with Aotearoa New Zealand serves to illustrate the complexity of the issue prevalent in British colonised countries in the northern and southern hemispheres. In particular, the introduction of the *Family Homes on Reserves and Matrimonial Interests or Rights Bill* in Canada finally captures the urgency of this issue for many colonial states.

The article is divided into three main parts. The first part focuses on Canada, the second part on Aotearoa New Zealand. In both these parts this article traces what has been the source of the issue: the colonisation of land and people and, in particular, the creation of Indian reserves and Māori freehold land. Both parts look at the new commitments being made in law to aspire towards reconciliation by making a commitment to recognise, in Canada, Aboriginal treaty and common law rights, and in Aotearoa New Zealand, the principles of the *Treaty of Waitangi*. Both parts then focus on the current and proposed law and policy regarding rights to the family home built on colonially created Indigenous lands upon a marital breakdown. The third part of this article specifically explores whether the proposed solutions sit within the context of reconciliation, and in particular, the quest for Indigenous self-determination. The conclusions are admittedly rudimentary, but convey excitement in that family law appears to be at the forefront in creating space for Indigenous laws to once again flourish in lands that once knew no other way.

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13 *Supra* note 9.

14 Family law has been at the forefront in attempting to recognise Indigenous peoples’ laws. This is probably because family law often goes to the heart of personal relationships and rights to personal property rather than all-encompassing rights to own and manage land and resources. See e.g. Norman Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada”, [1984] 4 C.N.L.R. 1; *Casimel v. Insurance Corp. of British Columbia* (1993), 30 B.C.A.C. 279, 82 B.C.L.R. (2d) 387. Similarly, in Aotearoa New Zealand there is also an intermittent history of recognising Māori customary marriages and Māori customary adoptions for specific purposes. See *Native Land Act 1909* (N.Z.), 1909/15; *Māori Affairs Act 1953* (N.Z.), 1953/94; *Māori Land Act 1993* (N.Z.), 1993/04; Jacinta Ruru, “Implications for Māori: Historical Overview” in Nicola Peart, Margaret Briggs, & Mark Henaghan, eds., *Relationship Property on Death* (Wellington: Brookers, 2004) at 445. In recent times, criminal law and dispute resolution law have also attempted to grapple with respecting Indigenous laws: see e.g. Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004).
II. CANADA

A. CREATING INDIAN RESERVES

The Europeans (namely the French and English) began arriving on the shores of eastern Canada some several hundred years earlier than their first forays into the waters of Aotearoa New Zealand. Treaty making, in the form of commerce, law, peace, alliance and friendship agreements, between the Aboriginal peoples and the Europeans began as early as the 16th century. Some treaties took the form of the Aboriginal peoples’ law through, for example, the recording of agreements in wampum belts, while other treaties first began to be recorded in accordance with the European custom of handwritten agreements in the 17th century. After a couple of centuries of contact (predominately in the east), in 1867 the first formation of the modern united Canada (namely Ontario, Quebec, Nova Scotia and New Brunswick) emerged with the passing of the British North America Act, 1867, now called the Constitution Act, 1867. This Act gave the new federal Parliament the exclusive legislative authority over “Indians and lands reserved for Indians”.

A decade later, Parliament passed the Indian Act, the first federal statute to deal substantively and exclusively with Indians. Essentially, it aspired to assimilate Aboriginal peoples into mainstream Canadian society, control Indians’ relationships with the federal Crown, and protect a small amount of Canada’s land base for the exclusive use and benefit of Indians. Pursuant to treaties or agreements with provincial governments (both pre- and post-1867),

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16 Constitution Act, 1867, supra note 3.
17 Indian Act, S.C. 1876, c. 18, especially s. 1.
the new arrivals, in claiming ownership of land and resources, relocated Aboriginal peoples onto small, scattered, and mostly unproductive land blocks. The Indian Act has governed the reserve system ever since. This Act was used to further define Aboriginal peoples as either ‘status’ or ‘non-status’ Indians. Status Indians had rights to reside on specific reserves and receive certain tax exemptions for property situated on a reserve. In comparison, those Aboriginal peoples that relinquished their identity, and thereby became ‘non-status Indians’, had rights to pursue a ‘civilized’ lifestyle, for example, to enrol in higher education.\textsuperscript{19} Moreover, the Indian Act explicitly regulated almost every aspect of Indian community life, including Indian ceremonies such as the Potlatch.\textsuperscript{20}

For those Aboriginal peoples who signed treaties with Canada between the late 19th century and the early 1920s, the treaties tended, from the European perspective, to cede or extinguish Aboriginal title in return for some combination of reserved lands, goods and a right to continue to hunt and fish on unoccupied Crown land. As the Royal Commission on Aboriginal Peoples nearly a century later accepted:

> In general, the European understanding ... was that the monarch had, or acquired through treaty or alliance, sovereignty over the land and the people on it. The Aboriginal understanding, however, recognised neither European title to the land nor Aboriginal submission to a European monarch.\textsuperscript{21}

In substantial areas, especially in the lands now classified as the province of British Columbia and in many of the northern territories, no treaties were negotiated.

The common law doctrine of Aboriginal title (which presupposes that following an assertion of Sovereignty, the sovereign power holds the radical title in the land subject to the Indigenous peoples’ title) provided little legal help to the Aboriginal peoples as the courts had limited the doctrine to arising from the Royal Proclamation of 1763 “which shew that the tenure of the Indians was a personal and

\begin{footnotes}
\item[19] An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act, 31st Vict. C. 42, S.C. 1869, c. 6, s. 86(1).
\item[20] Indian Act, S.C. 1886, c. 43, s. 114.
\end{footnotes}
usufructuary right, dependent upon the good will of the Sovereign". 22

The federal government transferred ownership of Crown lands and the jurisdiction over their development to the provinces, and Aboriginal communities were segregated onto insufficient and scattered reserved lands, and “one scholar writes that ‘... today ... all Canadian Indian reserves combined constitute less than one half of the Navajo reservation in Arizona alone.’” 23

**B. COMMITTING TO RECONCILIATION**

The 1970s marked the dawn of a new era in Canada. For example, the Canadian judiciary began developing a set of legal principles arising from Aboriginal and treaty rights as encapsulated in section 35 of the Constitution Act, 1982, centred on the “reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.” 24 At the heart of this jurisprudence is the concept that when the Crown deals with Aboriginal peoples, the Crown must act honourably: “The honour of the Crown is always at stake in its dealings with Aboriginal peoples”. 25 The honour “gives rise to different duties in different circumstances”. 26 In several circumstances the courts have held that the Crown’s honour gives rise to a fiduciary duty. 27 In more recent years, the Supreme Court of Canada came out with a series of decisions beginning in

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23 Scholtz, supra note 18 at 40. See also Cole Harris, Making Native Space: Colonialism, Resistance, and Reserves in British Columbia (Vancouver: UBC Press, 2002).


26 Haida, ibid. at para. 18.

late 2004 putting the duty to consult at the forefront of these interrelationships, stating:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. ... But, depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. 28

However, the new era has meant little for those residing on Indian reserves. The legal title for each reserve is still vested in the federal Crown for the use and benefit of a Band. 29 The Bands constitute the governmental unit on a reserve and are governed by an elected Chief and Council. The Indian Act stipulates that “No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band”. 30 A Certificate of Possession, issued by the Minister, is evidence of lawful possession. 31 The holder of such a certificate can make permanent improvements to the land, such as erecting a house in which to reside. Residential rights remain clearly with “[a] member of the band who resides on the reserve of the band with his [or her] dependent children or any children of whom the member has custody.” 32 No lands in a reserve can be sold or leased until they have been surrendered to the federal Crown. 33


29 Indian Act, supra note 1, ss. 2(1) and 18(1).

30 Ibid., s. 20(1).

31 Ibid., s. 20(2).

32 Ibid., s. 18.1.

33 See Ibid., s. 37(1) and (2).
Aboriginal peoples have the power to devise property by will,\textsuperscript{34} the Act makes it clear that a devise of land on a reserve to a person who is not entitled to reside on the reserve will become void.\textsuperscript{35} Moreover, the Act states that “A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister”.\textsuperscript{36}

In summary, the \textit{Indian Act} still effectively sets forth a paternalistic regime that regulates the lives of those living on reserves.\textsuperscript{37} Yet, in 1999, the federal Parliament passed the \textit{First Nations Land Management Act}.\textsuperscript{38} Significantly, this Act allows for Bands to apply for permission to manage their own affairs free from the \textit{Indian Act}. The Bands must adopt a land code in accordance with the Framework Agreement, and about twenty First Nations have done so to date.

\section*{C. \textsc{At Issue}: Matrimonial Real Property Law}

In Canada, matrimonial real property law is a provincial and territorial jurisdictional issue, not a federal one. Each province and territory has developed its own matrimonial real property laws.\textsuperscript{39} The provinces and territories usually define the family home as the place where the family resides, but in some provinces it can encompass, for example, a family holiday home. Usually exclusive possession of the family home follows the person who is successful in attaining custody of the children. Regardless of whether one or both spouses’ names are on the title to the family home, provincial legislation recognises the right of possession of both spouses to the

\textsuperscript{34} \textit{Ibid.}, s.45(1).
\textsuperscript{35} \textit{Ibid.}, s.50(1).
\textsuperscript{36} \textit{Ibid.}, s.49.
home. Upon divorce, some provinces provide for an equalization payment, others provide for an interest in the specific property. Remedies include:

- interim orders of exclusive possession to one spouse upon separation;
- orders of partition and sale;
- orders to set aside a transaction where the matrimonial home has been sold or transferred by one spouse without the other spouse’s consent.

While section 88 of the Indian Act does state that all laws of general application in any province are applicable to Indians in the province, it qualifies that general rule with several exceptions including if those provincial laws are inconsistent with the Indian Act. The courts have held that Indian reserve lands are considered federal Crown property and are therefore not subject to provincial laws.

In the late 1970s, the issue started to bubble through the courts and eventually, in 1986, the Supreme Court had its opportunity to clarify the developing precedent.\(^{40}\) In Derrickson v. Derrickson,\(^ {41}\) both husband and wife were members of the Westbank Indian Band. Mrs Derrickson, relying on provincial law, brought a petition for divorce and applied for one-half interest in the properties for which her husband held Certificates of Possession issued under the Indian Act. The Supreme Court of Canada held that provincial family law could not apply to the right of possession of Indian reserve lands. The Court stated:


The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the Constitution Act, 1867. It follows that provincial legislation cannot apply to the rights of possession of Indian reserve lands.\textsuperscript{42}

The Supreme Court heard a similar case in that same year where once again the husband and wife were both members of the same Band (this time the Tsartlip Indian Band), and the family home had been built on land for which the husband held the Certificate of Possession under the Indian Act. In this case, Paul v. Paul,\textsuperscript{43} the couple had been living in the home for sixteen years, and still the Supreme Court held that provincial family law could not be used to grant an order of interim occupation of a family residence on reserve. As in Derrickson, the Court held that provincial legislation could not be relied on because of the doctrine of federal paramountcy—the federal provisions (thus the Indian Act) must prevail.\textsuperscript{44} However, the Indian Act has been silent on spouses' rights to the family home on reserve lands, creating a legislative gap of mammoth consequences.

D. SEEKING SOLUTIONS

The 1999 First Nations Land Management Act provides one solution. In allowing First Nations to become exempt from the Indian Act and establish their own Framework Agreements, an Agreement must “establish a community process in its land code to develop rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of First Nation land and the division of interests or land rights in that land”.\textsuperscript{45}

\textsuperscript{42} Ibid. at para. 41.


\textsuperscript{45} Framework Agreement on First Nation Land Management (signed 12 February 1996), Art. 5.4(a), online: Framework Agreement on First Nations Land
twenty Bands have subscribed to this new solution to date, and only a handful have adopted a matrimonial property law, including Mississaugas of Scugog Island First Nation, Muskoday First Nation, Georgina Island First Nation and Lheidi T’Enneh First Nation. Some of the remedies being adopted include allowing the courts to make orders that an interest in First Nation land be transferred to a spouse absolutely or for partition and sale and a right of possession to the interest in First Nation land be awarded to a spouse.46

Self-Government Agreements provide another solution. Those which address provisions relating to land management show three distinct approaches to the treatment of matrimonial real property division: 1) broad Aboriginal jurisdiction; 2) shared provincial/territorial and Aboriginal jurisdiction; and 3) provincial/territorial laws of general application to apply to Aboriginal Lands.47 One of the more progressive agreements is the Meadow Lake First Nations Comprehensive Agreement-in-Principle, signed 22 January 2001, which clearly envisages that the Meadow Lake First Nation (“MLFN”) will have jurisdiction with respect to “the division or use of property on MLFN Lands belonging to spouses or cohabiting partners, including matters relating to the use, sale or division of equity in a marital home or an Interest in MLFN Lands”.48 The Agreement-in-Principle adds that MLFN law “will accord rights to, and provide for the protection of, spouses, cohabiting partners, children, parents, vulnerable family members and other dependent persons that are equivalent to the rights and protection enjoyed by similarly situated individuals in accordance with applicable federal or provincial laws”.49 Of interest, it states that the application of MLFN law to non-resident citizens will be


46 For an excellent summary of these rules see Cornet & Lendor, supra note 40.

47 “Self-Government Agreements and On-Reserve Matrimonial Interests or Rights”, online: Department of Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/wige/mrp/ipn9_e.html>.


49 Ibid., s. 26.03(2).
discussed in future negotiations. The final agreement has yet to be signed. However, not all agreements explicitly recognize Aboriginal jurisdiction over matrimonial property and in these situations the provincial/territorial matrimonial property laws of general application will apply. The Nisga’a Final Agreement and the Yukon Umbrella Final Agreement are two such examples.

Nonetheless, for the majority of Aboriginal peoples living in the provinces of Canada, these agreements have been few and far between. Instead, momentum built to seek an across-the-board possible solution.

Most prominently, the Department of Indian and Northern Affairs commissioned several papers on the issue of on reserve matrimonial real property in late 2002 and 2003. Then, in December 2004, the then Department’s Minister specifically requested advice from the House of Commons Standing Committee on Aboriginal Affairs and Northern Development “as to how the federal Crown can best address the longstanding issue of on-reserve matrimonial real

50 Ibid., s. 26.03(3). See also the Westbank First Nation Self-Government Agreement, online: Department of Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst_e.pdf> (note that it recognizes Aboriginal jurisdiction only in relation to matrimonial real property, not personal property).

51 Note that other agreements take different approaches. See e.g. ibid.

property". The Committee, in its June 2005 report Walking Arm-in-Arm To Resolve the Issue of On-Reserve Matrimonial Real Property, recommended that the government must “immediately draft interim stand-alone legislation or amendments to the Indian Act to make provincial/territorial matrimonial property laws apply to real property on reserve lands". It stated, however, that this legislation should authorize those First Nations to enact their own matrimonial property regimes within a set time frame, should they wish to do so.

The reaction to the report was mixed. The Assembly of First Nations completely opposed the “rapid legislative action to apply provincial and territorial law to on reserve matrimonial real property” because “this would constitute a violation of the right to self-government". It recommended that “[a]s an interim measure, the federal government could expand their analysis and opinions to accommodate what could be accomplished within the current Indian Act allowing First Nations to develop policies and procedures to ensure equality of property registration”. Some First Nations advanced plans to create their own law so as to avoid becoming subject to federal or provincial legislation. For example, in June 2007 the Anishinabek Nation Grand Council Assembly ratified the first modern Anishinabek Nation Law regarding matrimonial real property.

Then, in early March 2008, the Family Homes on Reserves and Matrimonial Interests or Rights Bill was introduced into the House of Commons. The Bill proposes an historically significant solution

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54 Ibid. at 23.


56 Ibid. at 4.

in that federal law has created the space for Indigenous law to be revived. The Bill is premised on the notion that matrimonial property reallocation should be determined according to Indigenous law and that federal law will be utilised only if a First Nation band has not had its Indigenous laws verified. In its own words, the purpose of the Bill is to:

... provide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.  

Thus, the Bill’s starting point is that First Nations will have the power to enact their own laws through a process of community approval and certification. A verification officer, who has been jointly appointed by the First Nation Band and the Minister of Indian Affairs and Northern Development, must first approve that the process for the community approval is in accordance with the Bill. The Bill establishes guidelines for the approval process. For example, all persons aged over 18 years whether or not a resident of the reserve can vote, and for a law to become effective, it must be approved by “a majority of eligible voters” representing 25 percent of the total eligible voters who participated in the vote.

The Bill then sets forth a detailed regime that will only apply in situations where First Nations have not had their matrimonial laws approved through this process. Some of the rules include: restricting what the holder of a right or interest can do with the family home during the relationship; providing up to 180 days automatic respite in the family home following the holder of the interest or right’s

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58 Bill C-47, supra note 4, cl. 4.
59 Ibid., cl. 7(1).
60 Ibid., cl. 9(1).
61 Ibid., cl. 11(2).
62 Ibid., cl. 13(2).
63 Ibid., cl. 13(1).
64 Ibid., cl. 20(1).
death, and thereafter the possibility of being granted exclusive occupation; permitting a judge to make an exclusive occupation order for up to 90 days where there has been family violence, or indefinitely where the relationship has simply ended, and a presumption that each spouse or common-law partner is entitled to an amount equal to one half of the value of the interest or right that is held by at least one of them in or to the family home. The Bill is comprehensive in its reach, setting forth a detailed federal regime which, when enacted, will close the existing legislative gap.

It is worthwhile conceptualizing the proposed Canadian solution within a comparative framework, and to this end, a country on the other side of the world, Aotearoa New Zealand, has been chosen.

III. AOTEAROA NEW ZEALAND

A. INVENTING MĀORI FREEHOLD LAND

In comparison to Canada, in Aotearoa New Zealand only one treaty was signed and a different colonist tool was implemented in the form of the Native Land Court. By way of background, after the initial years of contact (stemming from the late 18th century) representatives of the British Crown proposed, in 1840, the signing of a single treaty of cession, the Treaty of Waitangi. Expressed both in English and Māori, more than 500 Māori Chiefs from

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65 Ibid., cl. 19.
66 Ibid., cl. 26(1).
67 Ibid., cl. 21(1)(a), (5)(a).
68 Ibid., cl. 25.
69 Ibid., cl. 33.
70 Note that the Treaty of Waitangi differs from the Canadian treaties. See W. Renwick, “A Variation of a Theme” in W. Renwick, ed., Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts (Wellington, Victoria University Press, 1991) at 199. Renwick explains that by the time the treaties were signed on Vancouver Island, British Columbia (a mere decade later), “British imperial policy was determined by strategic considerations not humanitarian intentions” at 207. See also Caren Wickliffe who asserts that “The Treaty of Waitangi is fundamentally different to treaties in the Americas … [in that it] did not deal with the sovereign status of indigenous polities”, in “Te Timatanga: Māori Women’s Access to Justice” (2005) 8 Yearbook of New Zealand Jurisprudence 217 at 229.
throughout the country signed the Treaty (predominantly the Māori version). The translation reads that the Chiefs gave the Queen of England the right to govern, and in turn, the Queen agreed to protect the Chiefs’ rights in the “unqualified exercise [tino rangatiratanga] of their chieftainship over their lands, villages and all their treasures [taonga]”.\(^\text{71}\) However, the English version is expressed slightly differently.\(^\text{72}\) According to it, the Chiefs gave the Queen “absolutely and without reservation all the rights and powers of Sovereignty” (not simply a right to govern), but still confirmed and guaranteed to the Chiefs, families and individuals “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess”.

Colonisation initially took place pursuant to the Crown’s right of pre-emption as stipulated in both versions of the Treaty. The Crown entered into several land purchase agreements following the signing of the Treaty, especially in the South Island and the lower North Island.\(^\text{73}\) In the 1860s other means were used to ‘free up’ the lands for colonial settlement, including war,\(^\text{74}\) land confiscations legitimated through the passing of legislation,\(^\text{75}\) and the waiving of the Crown’s right of pre-emption in favour of a new specialist court, the Native Land Court.


\(^{75}\) See New Zealand Settlements Act 1863 (N.Z.), 1863/08; Suppression of Rebellion Act 1863 (N.Z.), 1863/07.
The Native Land Court became the heart of the new cultural genocide. Essentially, the Crown waived its right of pre-emption (as endorsed in the Treaty of Waitangi and common law doctrine of native title) in favour of Māori being able to freely alienate their land, the catch being that they first had to obtain a certificate of title. The system sought to transform land communally held by Māori (Māori customary land) into individualised titles derived from the Crown (Māori freehold title). The Native Land Act 1862 sought to advance and civilise Māori by assimilating their land ownership “as nearly as possible to the ownership of land according to British law”.

The creation of a Māori freehold land title was distinctly different to the colonial solution sought in countries like Canada. In Aotearoa New Zealand there was no like mass reserve system implemented. Instead Māori were recognised as the owners of their land as having the capacity to sell that land. However, bearing in mind that the Court’s creation was to facilitate colonial settlement, in reality it proved difficult for Māori to hold onto their land. Simply put, the Court was extraordinarily effective. By the 1930s very little tribal land remained in Māori ownership (today it amounts to six percent of Aotearoa New Zealand’s total landmass). Of the scattered land that stayed in Māori ownership, few blocks were permanently inhabited because that which remained in Māori hands mostly represented remote and non-arable land.

A decade after the Native Land Court was established, in 1877, the now named High Court deemed the Treaty of Waitangi “a simple nullity” because “No body politic existed capable of making cession of sovereignty”. The decision resembled in many respects the

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77 Preamble, Native Land Act 1862 (N.Z.), 1862/XLII.

78 To better appreciate the workings of the Court, see David V. Williams, “Te Kooti Tango Whenua”: The Native Land Court 1864-1909 (Wellington, N.Z.: Huia Publishers, 1999); Waitangi Tribunal, The Kaipara Report (Wai 674, 2006); and Richard Boast, Buying the Land, Selling the Land: Governments and Māori Land on the North Island 1865-1921 (Wellington: Victoria University Press, 2007).

Privy Council decision that arose from Canada: the St. Catherine's\textsuperscript{80} case. In both countries it was to take a century before such precedents would begin to be displaced.

B. COMMITTING TO RECONCILIATION

Since the 1970s, and articulated more eloquently from the mid-1980s, the description of the Treaty of Waitangi by the political and legal communities in Aotearoa New Zealand has been more in line with how Māori have viewed it ever since it was first signed: as a blueprint for how two peoples can live side-by-side in one place. In 1987, the Court of Appeal President, Cooke, concluded that “[Treaty of Waitangi] principles require the Pakeha and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality”.\textsuperscript{81} Government employees, and decision-makers in a variety of disciplines, now must have some level of regard to the principles of the Treaty of Waitangi.\textsuperscript{82} The judiciary has elaborated to define the principles to include such notions as active protection, acting in an honest manner to ascertain facts before a decision is made, mutual consultation, and recognizing the right of the Crown to govern and the right of Māori to exercise, in certain circumstances, tino rangatiratanga (self-determination).\textsuperscript{83} Moreover, the Waitangi

\textsuperscript{80} Supra note 22.


\textsuperscript{83} Other important Treaty of Waitangi cases include Attorney-General v. New Zealand Māori Council (No 2), [1991] 2 N.Z.L.R. 147 (C.A.); New Zealand Māori Council v. Attorney-General, [1992] 2 N.Z.L.R. 576 (C.A.); New Zealand
Tribunal has been established to investigate claims by Māori that they have been prejudicially affected by legislation, Crown policy or practice, or Crown action or omission on or after 6 February 1840.84 The Office of Treaty Settlements, as a branch of the Department of Justice, was established to resolve these historical Treaty of Waitangi claims.85

This new era did evolve into a slightly more respectful legal regime for Māori freehold land with the passing of the Māori Land Act 1993. This Act is centred on a new premise that Māori land ought to be retained by its Māori owners, and that the Māori Land Court should encourage the utilisation of Māori land for the benefit of its owners.86 Māori freehold land is defined as customary land of which the Māori Land Court has determined the beneficial ownership.87 Owners can acquire a certificate of title, but their capacity to alienate their land is restricted by the rules set forth in the Māori Land Act.88 In regard to succession, an owner of Māori freehold land only has the capacity to devise his or her interest in the land to persons who fall into a certain category—essentially blood relatives.89 If there is no will, the Act states that the owner’s children will succeed equally.90 At most, a surviving spouse or de facto or

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84 Treaty of Waitangi, supra note 9, s. 6 (as amended by the Treaty of Waitangi Amendment Act 1985 (N.Z.), 1985/148; Hayward & Wheen, ibid.
86 Māori Land Act, supra note 1, preamble, ss. 2 and 17.
87 Ibid., s. 129(2)(b).
89 Māori Land Act, supra note 1, s.108(2).
90 Ibid., s. 109(1).
civil union partner can expect a life interest until he or she dies or remarries.\textsuperscript{91}

While Māori freehold land and Indian reserves often share similar characteristics as rural, non-arable and subject to a paternalistic web of regulations,\textsuperscript{92} several distinguishing factors exist. One is obviously that owners of Māori freehold land receive a freehold certificate of title, not a Certificate of Possession. Another is that owners of Māori freehold land rarely reside on the land. This is often because it is common for Māori freehold land titles to have listed hundreds, if not thousands, of owners, all owning small fractured interests as tenants in common. Essentially, because the titles are overcrowded, it is nearly impossible for one owner to obtain consent from other owners to build a family home on the land. In 2002, Parliament sought a solution by empowering the Māori Land Court to vest in one specific owner the “exclusive use and occupation of the whole or any part of that land as a site for a house (including a house that has already been built and is located on that land when the order is made)”\textsuperscript{93}. These occupation orders are to be made for a specified time. Moreover, the Court may permit another beneficial owner in the land to succeed to an occupation order if devised to him or her by the original holder.\textsuperscript{94} However, the Court does not have jurisdiction to grant an occupation order in favour of a spouse or partner.

C. AT ISSUE: MATRIMONIAL REAL PROPERTY LAW

In Aotearoa New Zealand, prior to the 2001 amendments, the Matrimonial Property Act 1963 dictated a regime of judicial discretion based on contributions to property, whereas the Matrimonial Property Act 1976 ordered a presumption of equal sharing of matrimonial property, but it applied only upon separation or divorce. The 1963 Act continued to govern matrimonial property

\textsuperscript{91}Ibid., ss. 108(4), 109(2).

\textsuperscript{92}Jacinta Ruru & Anna Crosbie, “The Key to Unlocking Landlocked Māori Land: The Extension of the Māori Land Court’s Jurisdiction” (2004) 10 Canta L.R. 318; and J.A. Grant, Māori Land Development: Survey and Title (Te Tari Kooti, NZ: Department of the Courts, 2000). Note that Māori freehold land, for example, is more likely than general land to be landlocked and not actively managed.

\textsuperscript{93}Māori Land Act, supra note 1, s.328(1).

\textsuperscript{94}Ibid., s. 108(2)(b).
claims on death of a spouse. The Acts were inconsistent in regard to Māori land. The 1963 Act did not exempt Māori land meaning that if the family home was built on Māori land, then it was matrimonial property. However, the 1976 Act took a different stance and explicitly stated that its regime did not apply to Māori land. That meant that if the family home had been built on Māori land and the couple then separated, the equal sharing rule would not apply to the home (it would remain in the ownership of whichever of the couple had ownership of the Māori land, be it the husband or wife). In practice, the difference between the two Acts raised little concern. Little residential building has taken place on Māori land, and as John Chadwick, a prominent Māori lawyer has reflected:

Matrimonial Property is the only area of Family Law that I know of where whanaungatanga [family inter-relationships] prevails regardless of the law. This is because Māori, as a rule, do not have the same emotional attachment to property that the law guarantees. Since 1976 the Family Court in its matrimonial property jurisdiction, has by and large been the exclusive preserve of the white middle class.

The Property (Relationship) Amendment Act 2001 radically recast matrimonial property law and re-named the Matrimonial Property Act 1976 the Property (Relationships) Act 1976. The Amendment Act introduced new rules for the division of property upon separation or death for all Aotearoan New Zealanders, including Māori. The law presupposes that all property, including non-domestic property, owned by a couple—whether married, in a civil union, or in a de facto relationship—is relationship property and it is be shared equally. This includes the family home and family chattels as well as assets acquired by either partner during the relationship. The family home is defined as a dwelling house that the spouses or partners use habitually. All relationship property must be shared equally unless there are extraordinary circumstances which

95 Property (Relationships) Act 1976, supra note 2, s. 6.
97 For the full definition see Property (Relationships) Act 1976, supra note 2, s. 2 s.v. “family home”.


would make equal sharing repugnant to justice or the relationship is
of less than 3 years duration.\footnote{Ibid., ss. 11, 13. For more
detailed information see Peart, Briggs & Henaghan, eds., supra note 14;
R.L. Fisher, ed., Fisher on Matrimonial and Relationship Property
(Wellington: LexisNexis NZ, 2002).}

However, the Property (Relationships) Act retains the provision
in the Matrimonial Property Act 1976 excluding Māori land from the
Act’s operation.\footnote{Property (Relationships) Act 1976, supra note 2, s. 6:
“Nothing in this Act shall apply in respect of any Māori land within the
meaning of ‘Te Ture Whenua Māori Land Act 1993 [Māori Land Act].’ Note
that it is only Māori land (and thus fixtures attached to that land) that are
exempt from this regime. All other relationship property is subject to equal
division.} This means that the courts with jurisdiction to hear
a relationship property claim cannot make any orders that affect
Māori land. Specifically, the courts cannot make an occupation or a
tenancy order in relation to the family home on Māori land.
Nonetheless, the separating or surviving spouse or partner \textit{can} bring
a claim against all other property, including the family chattels. It is
only Māori freehold land (and all property attached to that land
because of the common law principle of \textit{quicquid plantatur solo, solo credit}
whatever is affixed to the soil, belongs to the soil) that is
excluded from the relationship property regime.

Hence the rules that determine interests in the family home are
found in the Māori Land Act. Its special rules are not disrupted by
the relationship property regime. Section 108 of the Māori Land Act
gives an owner of Māori freehold land the capacity to devise his or
her interest in Māori freehold land to his or her spouse or de facto or
civil union partner for life or a shorter period.\footnote{Māori Land Act, supra note 1, s. 108(4).}
But, if no such devise is made, the surviving spouse or partner has no ability in law
to challenge the will (assuming the devise has been made to a person
that falls within the permitted category, most typically a blood
relation).\footnote{Note that a spouse and partner is barred from making a claim under the Family
Protection Act 1955 (N.Z.), 1955/88. See Māori Land Act, supra note 1, s. 106(2)
which clearly states that only children and grandchildren can make a family
protection claim.} If the land is devised, for example, to a child from
another relationship, and that child is over 20, he or she will become
the new owner and will have the unfettered right to dictate who can
reside in the now defunct family home. The surviving spouse or
partner has no recourse in law to challenge such an eviction.
If there is no will, on intestacy, section 109 of the Māori Land Act states that a surviving spouse or civil union partner (but not a de facto partner) will receive the Māori freehold land interest for life or until he or she remarries or enters into a de facto or civil union relationship.

The Māori Land Act makes it clear that a person with a life interest:

a) is not capable of alienating the Māori freehold land in which the life interest is held without the consent of all persons entitled in remainder; and

b) holds that interest as a kaitiaki in accordance with tikanga Māori.¹⁰²

Significantly, the Māori Land Act makes no allowance for the spouse or partner who has lived in a family home on Māori freehold land and seeks a separation or divorce—the Act is totally silent as to this scenario. The only recourse the separating or divorcing spouse or partner has is to a relationship property claim based on a presumption of equal sharing of the family chattels and other property not affixed to Māori freehold land. The legislative gap does not arise because of a federal and provincial jurisdictional split as in Canada, but simply because Parliament has overlooked the issue in drafting the Māori Land Act. While Chadwick is correct to observe that matrimonial property division has not been a hot issue for Māori, there is evidence that this is changing.

In February 2005, the Māori Land Court heard an interesting case where a sole owner of Māori land wished to build a house for his family, but could only do so if his wife contributed $200,000 towards its construction.¹⁰³ She would make this contribution only if she became joint owner of the land. Without joint ownership, she would have no permanent rights to the property under a relationship property division or ability to devise her interest in the property to her son from a previous union (except perhaps via a constructive trust claim pursued in the High Court discussed below). The Māori Land Court accepted the reality of this dilemma. While the Court held that it had no jurisdiction to transfer half ownership to her, and

¹⁰² Māori Land Act, supra note 1, s. 150D. Note that “kaitiaki” means guardian, and “tikanga Māori” means Māori customary values and practices (see s. 4).
¹⁰³ Epita Williams Hills (2 February 2005), Wellington, New Zealand A20040001852 (Maori Land Ct.) Wainwright J.
refused to allow the land to change its status to general land,\textsuperscript{104} it declared ingeniously that it could order the house to be a chattel solely owned by her (that is, the house would not be deemed to be part of the land—the usual scenario—and would thus have to be built so that it could be easily transported from the land).

In 1994, the Court of Appeal heard a case that is specifically on point. In \textit{Grace v. Grace},\textsuperscript{105} a divorcing wife sought a beneficial interest in the matrimonial home that had been built on her husband’s Māori freehold land pursuant to constructive trust principles. However, during the court proceedings, she withdrew her claim and sought monetary compensation, relieving the Court from having to make this hard decision. In doing so, the possibility of a future court accepting a constructive trust claim remains.

In summary, while the current law in Canada has been painfully inadequate and is on the cusp of being reformed; in Aotearoa New Zealand, it is simply simmering. While the lack of reform in Aotearoa New Zealand may be rationalised because until recently few owners of Māori freehold land have actually lived and built on their land, this is not a sufficient justification for the legislative gap. As more and more owners of Māori freehold land find the means to live and build on their land (a scenario that Parliament has urged the Māori Land Court to facilitate via its role to encourage the use and development of Māori freehold land), Aotearoa New Zealand, and other colonised countries, must have their eyes on Canada as it strives to traverse a new legal order for family homes on Indian reserves. Simply put, Aotearoa New Zealand will be seeking solutions in a similar vein to Canada in the near future if more owners of Māori land decide to build and live on their land.

\textbf{IV. CONCLUSION: FINDING THE SOLUTIONS IN THE QUEST FOR SELF-DETERMINATION}

Canada has been actively seeking solutions to the matrimonial property division on reserve lands and is a world leader in attempting to do so. Canada’s experiences have relevance for other

\textsuperscript{104}The Māori Land Court does have jurisdiction to change the status of land, but only under specific circumstances, including where it is satisfied that “[t]he land can be managed or utilised more effectively as General land” \textit{(Māori Land Act, supra} note 1, s. 136(1)(d)).

British colonial countries, including the United States where the issue is likewise critical, and in Aotearoa New Zealand where the issue will become imperative. Canada’s proposed law, as encapsulated in the *Family Homes on Reserves and Matrimonial Interests or Rights Bill*, provides two avenues to springboard a wider discussion for finding solutions for the family home on Indigenous lands. First, because the Bill is historic in its reach in that it provides the space for First Nations to revive and reassert their own laws, a broader inquiry into the relationship between Indigenous law and state law in the 21st century warrants attention. Second, because the Bill offers a default position in law for those First Nations that have not verified their law on this specific issue, an examination of possible federal solutions in Canada and elsewhere merits scrutiny.

Turning to the first issue of what ought to be the relationship between Indigenous law and state law, other questions become integral, such as what are Indigenous laws and what relevance do Indigenous laws have in today’s society? Most prominently, law commissions in several of the British derived colonial states have delved into these issues. For example, in 2006, the Law Commission of Canada accepted:

> In the place of laws and dispute resolution mechanisms that developed in particular cultural contexts and resonated with the values and beliefs of the people governed by them, a legal system reflecting the values and culture of the European settlers was imposed on Aboriginal peoples…. Yet Indigenous legal traditions have not disappeared.  

The Commission went on to state:

> Support for revitalization of Indigenous legal traditions has its roots in the protection of Indigenous cultures, in the unique historical and political status of Indigenous peoples in Canada, and in the link to the development of healthy Aboriginal communities.

In 2001, Aotearoa New Zealand’s Law Commission specifically queried:

> If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve

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106 *Justice Within Indigenous Legal Traditions, supra* note 10 at 2.
a real endeavour to understand what tikanga Māori is [Māori law], how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.  

Many Indigenous communities throughout the world subscribe to a holistic Indigenous law framework that is based on values, rather than rules. They are comprehensive legal systems that would not function effectively if only parts were permitted to operate (as would be true of any legal system). As James (Sakej) Youngblood Henderson, Director of the Native Law Centre, writes, the sacredness of the teaching of First Nations jurisprudence is:

...revealed in kinship (respect in relationships); protocol (conduct in ceremonies and social interaction); healing (personal habits and practice in relation to health and spiritual gifts); ceremonies (roles and conduct); helpfulness (earning the right to knowledge); and oral tradition (expression of knowledge, it forms, and integrity).  

Similarly, Mary Ellen Turpel-Lafond writes of four principles key to social interaction in First Nations communities—namely, trust, kindness, sharing and strength. She states “These are responsibilities which each person owes to others representing the larger function of social life ... There is no equivalent of ‘rights’ here because there is no equivalent to the ownership of private property, and no equivalent to private or exclusionary spheres of social life”. Moreover, Henderson explains that the centre of the Mikmaq legal institutions and heritage are reflected in their verb-centred worldview which “emphasised the flux of the world, encouraging harmony in all relationships”. They believe “that the world was made according to an implicit design that could be at least partially apprehended and

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108 Māori Custom and Values, supra note 10 at 95.


enforced by them, not simply as a matter of balancing rights and wrongs or of reducing conflict resolution to trial by battle ...."112

Similarly, law professor John Borrows has written at length about Anishinabek law, telling the Indigenous legal stories of, for example, *Nanabush v. Duck, Mudhen and Geese*, and *Nanabush the Trickster v. Deer, Wolf et al.*113

Correspondingly, the Māori legal system is rooted in integral values such as: *whakapapa* (genealogy that links humans to all other living things including the mountains and rivers); *whanaungatanga* (family relationships); *manaakitanga* (hospitality); *kaitiakitanga* (guardianship); and *utu* (balance). These values are relayed through stories of creation, songs, dances and artwork (rather than as rules in statute books). Many, including now retired Justice Eddie Durie of the High Court, and tribal member of *Ngati Kauwhata*, have strongly articulated the content, complexities and continuing relevance of Māori law.114

Indigenous laws, as all laws, are capable of being adjusted to meet contemporary challenges. For example, turning to the Aotearoa New Zealand context, Hirini Mead has stated:

Tikanga are not frozen in time ... It is true however that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the [Māori] people. They do link us to the ancestors to their knowledge base and their wisdom. What we have today is a rich heritage that requires nurturing, awakening sometimes, adapting to our world and developing further for the next generations.115

The New Zealand Law Commission has similarly acknowledged that “tikanga Māori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present".116 The Law Commission stressed that there is “no culture in the world that does not

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112Ibid.


116*Māori Custom and Values, supra* note 10 at 3.
change" and that change can occur without detriment to its basic underlying values. It also accepts that there is a continuing need for Māori to maintain and adapt tikanga and “value in looking to the past; but only to the extent that it sheds light upon the present and the future”. Likewise, Durie has explained:

Māori customary law has conceptual regulators that have remained important for many Māori. The way that these conceptual regulators are expressed in today’s society is not identical to the way that they were expressed before the Treaty of Waitangi, at the time of the Treaty of Waitangi over 160 years ago, or as they will be expressed in 160 years from now. Change has occurred within Māori society to produce a different set of standards that are acceptable, but the underlying values remain the same. Tikanga Māori has always been very flexible, but the values that the tikanga is based on are not altered.

First Nations’ laws have similar capacity to Māori laws: they are flexible and adaptable in a manner that remains true to their values.

The courts in both countries have pitched reconciliation as the goal to be achieved with Indigenous communities. As such, this must involve finding respect for Indigenous legal systems. In Canada, the Family Homes on Reserves and Matrimonial Interests or Rights Bill is a significant step towards this aspiration. It is exciting that First Nations now have the opportunity to revive and reassert their laws in relation to matrimonial property. At this stage it is impossible to predict what form these laws will take. But values such as kinship, healing, ceremonies, helpfulness, trust, kindness, sharing and strength will surely be the guiding force in determining a modern take on Indigenous laws specific to situations where there has been a relationship breakdown and a resulting dispute about rights to reside in the family home.

While the Bill gives preference to Indigenous laws and this type of legislative partiality must be encouraged, will it be enough to ensure a successful revival and reassertion of Indigenous laws? It must be queried if the federal Crown should not only be providing

117 Ibid.
118 Ibid. at 5.
the legislative space, but also the financial and administrative means for this to occur. Colonisation has been an insidious process that has all but destroyed Indigenous communities. The strength of this proposed Bill is that it gives preference for Indigenous laws, with federal law there in default of verified Indigenous laws. But will it be enough to engender a new more reconciled division of matrimonial property on reserves? And, is it fair for the federal Parliament to essentially pass the problem that it created back to the communities to solve? Moreover, will the communities be able to bring peace back into their communities following a marriage breakdown when the proposed law only permits Indigenous laws to be revived in a specific aspect of the healing process: matrimonial property division? That is, how effective can Indigenous laws be when confined to specific instances, and in all other respects subsumed by federal law, namely the Indian Act?

In many ways, the permission to revive Indigenous laws of matrimonial property may be, to borrow a well-used cliché, the ambulance at the bottom of the cliff. For Indigenous laws to be truly effective, they need to be given effect in the full lives of Indigenous peoples. It might only be through this more expansive embrace of Indigenous laws by the federal Parliament that breakdown of relationships in the first place might be minimised, for the ruin of many families is surely an indicator of an unhealthy wider community network. While this Bill is a step towards the vision of reconciliation, perhaps it is but the first rung on a very long ladder.

Turning to the second issue: is the default federal solution adequate, and, more specifically, does it provide answers for other countries seeking solutions, such as Aotearoa New Zealand?

The default federal solution as proposed in Family Homes on Reserves and Matrimonial Interests or Rights Bill is one that has taken many years to devise. It appears to provide a mostly workable solution providing initial 90-180-day respite orders depending on the circumstances, and the possibility for exclusive occupation orders. While the presumption of being able to compensate the spouse or partner with an amount equal to one half of the value of the interest or right held in the family home is commendable, in reality this may be financially possible only in few instances. Before the Bill becomes law, one point that might require some thought is
what ought happen to the holder of an exclusive occupation order if he or she remarries, or enters a common law relationship.\textsuperscript{120}

In regard to Aotearoa New Zealand, it is a country that has yet to propose any law that will return law-making control back to Māori. The \textit{Family Homes on Reserves and Matrimonial Interests or Rights Bill} should act as a yardstick for change for that country, and other colonised countries. At the very least Aotearoa New Zealand needs to amend the \textit{Māori Land Act} to create a solution for separating and divorcing couples where the family home has been built on Māori freehold land. The legislative gap is unacceptable. The favourable solution would be for the law to be amended to extend the Māori Land Court’s current jurisdiction to something akin to the exclusive occupation orders proposed in Canada. Or, alternatively, the \textit{Māori Land Act} could be amended to declare all structures on Māori freehold land as chattels. This would then allow the family home to come within the equal sharing presumption of the \textit{Property (Relationships) Act}. Yet this scenario might create logistical building problems and greater uncertainty for the general development and utilisation of Māori land. Perhaps, the best influence of the \textit{Family Homes on Reserves and Matrimonial Interests or Rights Bill} would be for it to generate space for Māori to reassert their own laws based in respect for family relations.

The family home is the centrepiece and hearth of the family. While the home is a sanctuary from public view—“the place where private life is enjoyed”\textsuperscript{121}—determining rights to it following the breakdown of a relationship (be it because of death, separation or divorce) requires clear legal articulation. In many colonial countries, Indigenous peoples have been denied the opportunity to assert their own laws and because Parliaments have often failed to turn their attentions to the issue, peoples living in family homes on colonially created Indigenous lands have had no state law to turn to for recompense. In March 2008, Canada became a standout country for

\textsuperscript{120}Noting that in Aotearoa New Zealand, the spouse’s or partner’s life interest in Māori freehold land ceases upon remarriage, but note that the law is somewhat peculiar in its differentiation of marriage and de facto and civil union relationships. See Jacinta Ruru & Michael Stevens, “Māori land and non-owners’ rights” [2007] 9 N.Z.L.J. 325.

at last tackling the issue and introducing the *Family Homes on Reserves and Matrimonial Interests or Rights Bill*. This Bill is historic in its reach in that it provides the space for First Nations to revive and reassert their own laws. Moreover, it provides a default federal law position that will provide some long overdue certainty for those residing on family homes on reserves. Significantly, the Bill represents a means to appreciate the monumental shift that has occurred in thinking about how our legal systems ought to interact with its Indigenous peoples. We could be (just) on the brink of a new, more reconciled, era.