



## ***Matrimonial Real Property (MRP)*** ***A Glossary of Terms***

***Plain  
Language  
Summary***

### **Matrimonial Real Property**

“Real” property refers to interests or rights to land, (like Certificates of Possession) and buildings or other structures tied to the land. In the case of married couples, or those in a common law or Aboriginal custom relationship, this kind of property is considered “matrimonial real property” under the laws of all provinces, and the rights of both partners are protected. However, because of the unique status of real property on Indian reserves, provincial laws dealing with matrimonial real property disputes do not normally apply, or are virtually impossible to enforce.

***In Detail...***

There are two types of “matrimonial property”: property that is movable (like cash, bank accounts, cars and boats, etc.) and property that is not normally movable, which is referred to as “real” property. The *Indian Act* (at section 88) states that provincial laws of general application apply to Indians, subject to anything in the *Indian Act*, and to the terms of any Treaty). As a result, provincial laws dealing with the distribution of matrimonial property that is movable applies on reserve.

However, the courts have held that these provincial laws do not apply to “real property”, both because of specific provisions in the *Indian Act* that prevent any court order or restraint applying to real property situated on reserve, and because Indian reserve lands are considered as federal Crown property, and not subject to provincial laws. At the same time, there are no provisions in the *Indian Act* for the disposition or management of land or other real property. This creates a “gap” in the law.

Off reserve, provincial laws protect the interests of both spouses or partners in a relationship – including rules for the temporary or permanent possession of the family home, and rules that prevent either partner from selling or giving away the family home without the other partner’s rights or interests being respected. On reserve, the *Indian Act* has no rules about the possession or sale of the family home or for interests in the land itself (see the discussion below under Certificates of Possession and Custom Allotments). As a result, many spouses – and particularly women and children – are placed at a serious disadvantage. Their rights are simply un-protected.

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### **The Indian Act**

The *Indian Act* is the main federal law dealing with the management of Indian reserve lands, and with such matters as Band membership, Indian status entitlements, and the governance of Indian Bands through the Chief and Council system. It is an ordinary statute of Parliament, and as a result it cannot define, infringe on or extinguish any constitutionally protected rights, including the ‘aboriginal and treaty rights’ of the Aboriginal peoples of Canada, which were recognized and affirmed as the highest law of the land in 1982. The *Indian Act*, being originally designed in

the 19<sup>th</sup> century, is quite out-dated in many areas. It is entirely silent on the issue of matrimonial property disputes or issues, and provides no rules for the protection of a spouse in relation to the possession or sale of real property such as the family home.

*In Detail...* The *Indian Act* was introduced in 1868 based on pre-Confederation legislation dealing with the management of reserve lands set apart by the Crown (including colonial governments and the British government) for the use and benefit of any Band, tribe, nation or body of Indians. In the mid 1870s this legislation was amended to become a ‘cradle to grave’ framework to control the lives and fates of Indian people, and to support their assimilation or integration into the general non-Indian society. As a result the *Indian Act* has many rules to allow for the sale or surrender of reserve lands to the Crown, but very few rules that deal with the management of reserve lands by Bands or their governments.

Some reforms to this 19<sup>th</sup> century framework to manage Indian reserve lands have been made over time. Rules allowing forcible enfranchisement of Indians who were deemed to be ‘civilized’, and rules preventing Indian people on reserve from having the vote in federal elections, were repealed in 1960. In 1985, Bill C-31 was passed as an ‘interim’ measure to prevent status and membership entitlements from being lost by women as a result of marriage to non-status Indians or non-Indians: something that would have been illegal as a result of the new *Charter of Rights and Freedoms*. However, in relation to land management, the old, 19<sup>th</sup> century framework of the *Indian Act* remains essentially intact – which leaves most control in the hands of the Minister and provides very limited powers of governance or accountability to the community.

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### **Treaty Rights**

Treaty rights are rights that are set out in two broad types of agreement between Aboriginal peoples and the Crown: agreements (most often called ‘Treaties’) both before and after Confederation up to the 1930s (such as Treaties # 1- 11 covering most of Ontario and the Prairie provinces); and modern Treaties or land claims agreements (from 1976 to the present). The rights under both kinds of Treaties are protected against both provincial and federal laws (ordinary statute laws) as a result of the *Constitution Act, 1982*. The *Indian Act*, for example, is not part of the Treaties, and it cannot alter or infringe Treaty rights.

*In Detail...* About 50% of the Indian reserves in Canada were set aside as a result of Treaties. A major issue, however, clouds the determination of which group or collective actually hold rights under treaty. Is it the people that the *Indian Act* recognizes as the ‘Band’ that controls these treaty reserves? Or is it the wider treaty-based nation or community – regardless of status or membership in the *Indian Act* Band? In the case of some Treaty reserves, this is a not an un-important issue, since up to 90% of the Treaty and even status Indian population may have been stripped of Band membership, leaving only 10% or so of the Treaty-based population holding control over the reserve, which in most cases is the most important remaining benefit of the treaty itself. Because the *Indian Act* was not designed to implement Treaty rights – and is for the most part silent on Treaty rights – there is another ‘gap’ in the law: a “Treaty Gap”.

Since 1982, Parliament has had no legal authority to alter or affect Treaty rights through ordinary legislation like the *Indian Act*. However, since the *Indian Act* is silent on Treaty rights, amendments to it can un-intentionally affect those rights. For example, a person who is a Treaty Indian with interests in a Treaty-based reserve land might effectively lose any real opportunity to benefit from her Treaty if her Band membership or status entitlements are altered by Parliament. As a result, it is very important when amending the *Indian Act* to ensure that Aboriginal and Treaty rights are not negatively affected – whether directly or indirectly. This gap allows an ordinary statute like the *Indian Act* – which can be changed at any time by Parliament – to alter, infringe or even define constitutionally protected Treaty rights.

**Reserve**

The *Indian Act* defines a ‘reserve’ as lands set aside by the Crown for the use and benefit of a ‘body of Indians’ or a Band. Because *Indian Act* reserves are federal property, they are not normally subject to provincial laws, although the courts have ruled that some provincial laws do apply (such as dealing with traffic laws). This kind of reserve is different from the broader, constitutional meaning of “reserve”, which refers to any lands that Aboriginal peoples have aboriginal rights or titles to and where those rights have not been surrendered or exchanged for other rights, such as Treaty rights. As a result, a great deal of provincial and federal Crown land in some regions are still “reserves” in the sense of being subject to Aboriginal rights.

*In Detail...*

There are two meanings to the term “reserve”. The broader, constitutional meaning is “lands the aboriginal title to which is un-surrendered” – a term that covers much of British Columbia, parts of Ontario, much of Quebec and almost all of the Maritimes. These lands, as “lands reserved for the Indians”, fall under exclusive federal jurisdiction as a result of Parliament’s exclusive power to legislate for “Indians, and Lands reserved for the Indians” in section 91(24) of the 1867 *Constitution Act*. Such ‘reserve’ lands may be held in law by Indians (regardless of status or recognition as Bands), Inuit and Métis, according to Supreme Court decisions from 1888 (*St. Catherine’s Milling*) to the present (*Delgamuukw*). Such reserves are not up to the federal government to recognize or set apart, since they are reserved to the relevant Aboriginal nation, community or group by simple fact that the rights involved have never been extinguished or given up by treaty.

The second and more narrow meaning of ‘reserve’ deals with the over 2,600 plots of land set aside by decisions of the federal or pre-confederation colonial governments as reserves. These reserves are governed by the *Indian Act*, the vast majority of which are assigned to the 617 Bands that are federally recognized (though about 40 such Bands do not hold any reserve lands at all). About half these *Indian Act* reserves have their origins in Treaties, and as a result are complicated by treaty entitlement issues. The rest have been set aside by colonial or federal enactments (usually Orders in Council, or decisions under what is called ‘Royal Prerogative’, without any treaty authority or connection to constitutional rights). It is generally accepted that the non-treaty reserves are validly held by the Bands concerned as defined under the *Indian Act*.

The complication arising from the Treaty-based origin of many reserves is that the membership or status provisions of the *Indian Act* have allowed the rights of many Treaty people to be stripped from them as a result of out-marriage or enfranchisement (before 1985), or as a result of a decision of the remaining status Indians or Band members to exclude certain Treaty descendents from membership in the *Indian Act* Band. In law, however, even if a person has no status under the *Indian Act*, or lacks membership in an *Indian Act* Band, they may still have entitlements to live on or use the reserve if it was set aside under a Treaty, and where they are a Treaty beneficiary. Before 1982 (when the Constitution recognized and affirmed aboriginal and treaty rights) Parliament could only pass laws that terminated or extinguished a person’s or groups treaty rights if it did so explicitly, and the *Indian Act* has never attempted to explicitly affect such rights. Since 1982, no federal law can extinguish Treaty rights – whether it has plain and explicit language to that intent or not.

The result is a conflict between constitutional rights under Treaty, on the one hand, and the impacts or effects of the *Indian Act* on the other hand. Therefore any effort to amend the *Indian Act* must take great care not to directly or indirectly alter or infringe on a person’s or a community’s Treaty entitlements. In the case of Treaty reserve land management, this may mean that a person who is a non-member of a Band (for example the children of a section 6(2) woman whose father is unknown) may still have Treaty rights and interests in that Band’s reserve lands (something that the *Indian Act* itself recognized from the 1880s through to 1985). That person’s Treaty rights cannot legally be infringed by Parliament, but her rights may well be suppressed unless her rights are acknowledged in practical terms.

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**Indian**

There are two broad legal meanings of the term ‘Indian’. The most familiar is a person who is entitled to be registered as a ‘status Indian’ under the *Indian Act*. This definition excludes many persons of Indian descent or identity, and includes some persons of no Indian descent or identity (e.g., non-Aboriginal women married into a Band before 1985). The second meaning – a constitutional one – is much broader and likely includes all First Nation or Indian people, regardless of status, as well as the Inuit and the Métis: in short, all the Aboriginal peoples of Canada.

**In Detail...**

As with the concept of ‘reserves’ there are at least two broad meanings of the term ‘Indian’. The broader, constitutional meaning is probably best identified as ‘Aboriginal’, which was the consensus view of all governments and Aboriginal organizations in the Charlottetown Accord in 1992 as well as the conclusion and recommendation of the Royal Commission on Aboriginal Peoples in 1996. The Royal Commission felt that the term ‘Indian’ as referred to in the *Constitution Act, 1867*, referred to all the ‘aboriginal’ people of the country – including the various First Nation or Indian people, the Inuit and the Métis peoples.

The *Indian Act* has a different and much narrower meaning of the term ‘Indian’. This narrow, legislative meaning – which has varied over the years – refers now only to persons who are members of Bands for which lands (or moneys) have been set aside by the Crown, or who have been otherwise declared to be Bands for the purposes of the *Indian Act*. The definition of an Indian in this narrow context is almost circular – since to be an Indian under the *Indian Act* one has to be a descended from a member of a Band established by the Crown and not otherwise excluded from being a ‘status’ Indian by the highly controversial and convoluted rules of exclusion set out in that Act (e.g., the second generation cut-off).

Since Confederation, the federal Crown (through the Cabinet) has recognized a number of Bands as a result of Treaty-making in western and northern Canada, but outside of the Treaty process (which largely ended in 1930) very few groups have been recognized or established as Bands within the *Indian Act*’s meaning. Recent examples include the Miawpukek First Nation in Newfoundland (1984) and the Woodland Cree Band (in Alberta, 1992) and the two Innu communities in Labrador (2002). All the founding or charter members of these Bands acquire registration entitlements under the *Indian Act*, but their children or grand-children may not be assured status as “Indians”, depending upon who their parents marry.

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**Band**

In the *Indian Act*, this term refers to the ‘body of Indians’ for whom a particular reserve or reserves has been set aside, or for whom moneys have been set apart, or who have simply been recognized as a Band by the Governor in Council (the Federal Cabinet) for the purposes of the *Indian Act*. Not all Indian or First Nation people are organized into *Indian Act* Bands, and of course many First Nation or Indian people have been prevented from holding membership in a Band they are connected to as a result of the membership and status provisions of the *Indian Act*.

**In Detail...**

Originally, the term ‘Band’ was only one of many used in constitutional and legal language to refer to a unit of Aboriginal governance – other terms included ‘nations’, ‘tribes’ and even ‘federations’. From 1951 onwards, the *Indian Act* eliminated earlier references to ‘nations’ or ‘tribes’ and substituted the term ‘Band’, which is defined simply as “a body of Indians for whom a particular reserve or money account has been set aside by the Crown” or which is otherwise established by an Order in Council by the Federal Cabinet. Therefore the term ‘Band’ does not mean the same thing as a ‘First Nation’ – which may be comprised of several Bands as well as the non-status and/or non-members of the *Indian Act* Bands concerned.

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**First Nation**

The term ‘first nation’ is not a constitutional or regular statutory term – and so it means many different things to the many different people who use the term. Generally, First Nation refers to an Indian nation or group of communities connected by common cultural, linguistic and historical connections – regardless of status or Band membership under the *Indian Act*.

*In Detail...*

In federal law, there are at least 5 different meanings of the term ‘First Nation’ – ranging from “an aboriginal people, however organized, within its traditional territory” (*British Columbia Treaty Commission Act*) to “a Band within the meaning of the *Indian Act*” (*First Nation Land Management Act*).

The Royal Commission on Aboriginal Peoples concluded that there are some 60 or more First Nations in Canada, and that only in the rarest of cases is a First Nation also an *Indian Act* Band.

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**Band Member**

In the *Indian Act*, Band membership is determined by the Band members, if they choose to pass their own membership rules. About 235 Bands have adopted their own rules. For Bands without their own membership rules in place, the *Indian Act* determines Band membership using the same rules to decide entitlement to registration or ‘status’. In the context of the MRP issue, it is important to note that only Band members can have Certificates of Possession or receive Band housing, and normally only Band members have any kind of secure or protected right to reside on a reserve.

*In Detail...*

Under the *Indian Act*, any person may be a member of a Band – as long as the Band concerned has its own rules determining Band membership (and about 235 of 617 Bands have such rules). Band members – whether status Indians or not – have a variety of rights that are respected under the *Indian Act*. However, even spouses who are members may face the MRP “gap” since there are no laws – Band, Federal or provincial – that apply to reconcile interests in the ownership or possession of the matrimonial home on reserve or the underlying certificate of possession or custom allotment, which is usually issued only to one of the spouses.

Ironically, even if both spouses in an MRP dispute are Band members, the lack of status under the *Indian Act* of one member can put her or him (and it usually is her) at a major disadvantage. Only status Indians can seek a court order against another Indian in relation to on-reserve property in dispute (including movable property). Therefore even if a woman is a Band member, if she is not a status Indian, she cannot go to a court of law to get an enforcement order in relation to her husband’s reserve-based property (whether it is ‘real’ property or movable property).

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**Band Council**

The Chief and Council of an *Indian Act* Band, whether elected under the rules set out in the *Indian Act* or elected or selected by the custom of the Band. The *Indian Act* sets a maximum size for Band Councils elected under its rules at one Chief and 12 councilors.

*In Detail...*

Under the *Indian Act*, the members of a Band are represented by a council, but only for the purpose of the *Indian Act* (which is almost entirely focused on reserve-based governance issues). The council of the Band of any particular reserve (and many Bands have more than one reserve) is headed by a Chief (elected in accordance with custom – in about 40% of the country – or by *Indian Act* rules, allowing all members, regardless of residence, to vote). Councilors are elected in most cases by members on and off-reserve, but in about 40% of the country only reserve resident members can vote. Under the *Indian Act* rules, only resident members can nominate Councilors, a restriction that is almost certainly in breach of the *Charter of Rights and Freedoms*.

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**Certificate of Possession (CPs)**

A license or ticket given to a person (and sometimes a couple or a family) by the Minister on the advice or approval of the Band council that entitles them to possess a certain part of the reserve. On reserves, nobody has the right to sell their land or the CP that allows them to occupy the reserve land except to another Band member (if the Band council's rules permit this) or to the Band council.

*In Detail...*

The *Indian Act* provides that the Minister, with the approval of a Band council, can provide a certificate of possession (CP) to any member of the Band (whether or not a status Indian) which entitles that person to occupy the parcel of reserve land in question for any purpose allowed by law. In practice, CPs are regularly approved by regional officials of Indian and Northern Affairs Canada (INAC) based on Band Council Resolutions (BCRs), and about half of all the lands on reserve in Canada are occupied in this way. Most CPs are issued for a nominal fee – often only one dollar.

However, only Band members can be issued CPs – which means that if a spouse of a Band member does not have his or her name on the CP, they hold no statutory rights to the land concerned. Because provincial laws regarding matrimonial property do not currently apply on reserve, this means that the spouse with no CP ownership cannot stop the CP owner from selling the CP right, with or without his or her consent.

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**Custom Allotment**

Bands that do not use the CP system set out in the *Indian Act* often issue allotments or location tickets to Band members using a custom system. The result is a 'custom allotment' that is generally respected by the Band membership.

*In Detail...*

Many Bands have allotted land interests within reserves according to customary rules or practices – normally referred to as 'custom allotment'. The difficulty that has emerged is that there is nothing within the *Indian Act* that recognizes or authorizes such allotments – leaving them without any capacity to be enforced in court, or for disputes over matrimonial real property to be arbitrated outside of whatever dispute resolution mechanisms the Band chooses to put into place. While some Bands do have procedures to arbitrate disputes (usually at special Band Council meetings), it is very difficult to appeal such decisions if a person feels they are unfair. In the case of MRP disputes involving non-members, few Bands have introduced any formal dispute resolution or appeal procedures – adding to the problem of the gaps already in place as a result of the *Indian Act's* formal rules.

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**Certificate of Occupation (CO)**

This is a special licence or ticket allowing a person – even a non-member – to occupy a part of the reserve for up to one year by the authority of the Minister.

*In Detail...*

The Minister is able to allow any person – whether a member of the Band or not – to occupy a portion of the reserve for no more than 1 year through a Certificate of Occupation (CO). After that time, the Band council must authorize the occupancy through a formal Certificate of Possession (CP), with no recourse for the occupant other than to be compensated for any improvements to the property. Certificates of Occupation are rarely issued at present, but can be utilized by the Minister to permit a non-member spouse in a MRP dispute to remain on the reserve for at least one year.

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**Possession Orders (by the courts)**

An order of a provincial court that says a person can have exclusive or shared occupation of a house under certain conditions – usually given to allow a woman and her children to live in a home even when it is formally owned by the husband. This kind of order is often given in the case of family violence situations – where one spouse is seen by the court as a threat to the other

spouse and/or to the children.

*In Detail...* The Supreme Court of Canada has ruled that provincial court orders regarding possession of a family home, even for temporary purposes, cannot apply on reserve – since real property is only subject to federal laws. Because federal laws are silent on the issue, and very few Bands have chosen to fill in the gap themselves – possession orders are rarely granted and are entirely unenforceable. As a result, spouses (mostly women) facing the threat of family violence cannot shelter themselves or their children by asking the courts and police to enforce exclusive possession orders in the family home on reserve.

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**The Marital Home**

The home or house occupied by a couple during their marriage, common law or Aboriginal customary relationship.

*In Detail...* On reserve, the vast majority of privately built or owned homes are in the name of only one of the spouses concerned – usually the man, and in all cases a Band member. The problem is that the other spouse – even if she is a Band member – is at an automatic disadvantage. In the case of a marital dispute or family violence, she cannot go to a court or any other decision maker to obtain exclusive possession of the family home, even for temporary purposes, such as to protect her and the children in cases of family violence.

Even in the case of Band-owned housing, the lease is usually in only one spouse's name, and usually the man's. In this case again, there is nothing in the *Indian Act* or applicable provincial law that protects the rights of spouses. A woman can be forced out of the family home with no compensation – and she often is faced with providing for their children as well, on her own.