IBA FINAL CONFERENCE REPORT ADDENDUM

MATRIMONIAL-REAL PROPERTY ON- RESERVE MEETING WITH INDIAN AND NORTHERN AFFAIRS CANADA

October 21st, 2006, Saskatoon, Saskatchewan

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MEETING SUMMARY

The Indigenous Bar Association ("IBA") would like to thank Indian and Northern Affairs Canada (INAC), in particular the Matrimonial Real Property Group in the Women's Issues and Gender Equality Directorate for attending the IBA Annual Conference on this important initiative in relation to matrimonial real property on-reserve (MRP) – in particular our thanks and acknowledgements are extended to Holly King, Steve Frances and Matt Robinson for their presentation and responses to the many questions put forward by IBA members and conference delegates in attendance.

A. ATTENDANCE AT MRP MEETING

The October 21, 2006 meeting ("the Meeting") was one of five concurrent sessions offered on varying topics available to the IBA Annual Conference delegates and was well-attended, with approximately 18 attendees, half of whom were women. Notably some of the participants included: current IBA board members, the president of the IBA, a past-president of the IBA, lawyers and student members of the IBA and other conference delegates.

Wendy Grant-John, the Ministerial Representative for this initiative was invited and scheduled to attend, but did not attend on the day of the seminar.

The INAC representatives attending the Meeting provided their printed materials on the day of the Meeting. The materials were very briefly reviewed in the course of their presentation.

B. INITIAL ISSUES RAISED BY MEETING PARTICIPANTS

The presentation sparked a number of questions and comments both querying and constructively critical of the INAC process. All questions were responded to by the presenters. Based upon the presentation, questions, answers and

discussion at the Meeting, the IBA made various proposals to the INAC representatives and was able to further develop its position on this important issue. The IBA's position is reflected through the recommendations and written commentary contained within this Addendum, which is provided to INAC for its consideration in its future deliberations and action on MRP.

There was particular concern vocalized by approximately half of the Meeting attendees that the presentation should not be construed as a formal consultation process on proposed legislation but rather a consultation on determining the IBA's position with respect to MRP generally and INAC's initiative in relation to the same. In particular we note that INAC did not provide any legislation or draft provisions for comment by the delegates to specifically res pond to and provide comments on and were advised that none was available at the time of the presentation.

The representatives from INAC advised that a consultation process would be envisioned after draft legislation was produced. This led to a series of questions by at least three attendees questioning whether draft legislation was already produced by INAC and if it was going to be shared for review, discussion and input. It was also asked if the current "consultation" process was being used to prepare responses to existing draft legislation and/or if the process was simply engineered to justify any legislative drafting efforts that were being contemplated or initiated by INAC.

INAC's representatives outlined the internal process for government departments to proceed with drafting legislation, which included the involvement of Crown lawyers from the Department of Justice. The INAC representatives confirmed that such a process had not yet been initiated and that until draft legislation was requested to be drafted it would not be prepared.

It was a strongly held view by the majority of attendees who vocalized the same, that Indigenous customs and practices must be included in any change to a matrimonial property regime on-reserve. Attendees stressed that a fee simple approach that supports an individual land-tenure system on-reserve is not in keeping with Indigenous customs and practices and may undermine the collective rights of Indigenous communities.

A significant and meaningful consultation process on any draft legislation or policy contemplated by Canada is required by law and may assist in building some foundation of trust with the Crown as trust has been lost and undermined by the Crown's actions in relation to Bill C-31 and its failure to respect Aboriginal rights and uphold its treaty obligations.

It was agreed at the Meeting that the IBA would provide written comments to INAC in relation to these important issues, not just with a summary of the Meeting's comments and questions but also with a formal written IBA position – both of which are included in this Addendum to the IBA's Final Conference Report. The Final Conference Report and Addendum will be posted on the IBA's website for public availability.

The IBA submits this presentation with a genuine desire for reform that will address the inequity experienced by many Indigenous families as a result of marriage breakdown in Indigenous communities and uphold Indigenous customs and practices.

SUMMARY OF IBA RECOMMENDATIONS ON MRP

A summary of the IBA's recommendations regarding matrimonial real property on-reserve is set out below.

1) **INAC should not insist on legislative changes to address the issues of MRP; instead it should address issues related to First Nation self-government and self-determination with First Nations in a bi-lateral process. A start would be to fulfill its commitments under the *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Government* (2005) which would enable First Nations and the federal government the opportunity to address the issue of matrimonial real property amongst other important governance issues.**

2) **While self-governance policies and/or laws are being considered bi-laterally, First Nations are in a position to address some of the matrimonial property issues consistent with their right of self-government and the rights of First Nations to control the use and allocation of their lands. For example:**

    a) **when a relationship breaks down, Chief and Councils in Canada can issue Certificates of Possession for matrimonial homes in the names of the children of a marital relationship to ensure that the children remain in possession of the matrimonial home and thereby the custodial parent will remain in the home with the children so long as they require parental care and supervision.**

b) **That Chief and Councils, for any children who are not Indians in accordance with the provisions of the Indian Act and thereby unable to be named on a Certificate of Possession but who are living in a matrimonial home on reserve, can issue Certificates of Possession for the matrimonial home in the name of the closest related and oldest aunt or grandparent(s) of the children who is an Indian under the terms of the Indian Act and can lawfully hold a Certificate of Possession.**

3) **In the alternative, should INAC insist upon pursuing legislation on the issue of matrimonial real property, the legislation should be substantively reflective of the principles of legal pluralism by ensuring Indigenous practices and customs in relation to marriage and family breakdown are recognized as well as recognizing Indigenous methods of dispute resolution.**

4) **Should Canada consider legislation or policy relating to MRP, a new and meaningful consultation process commence immediately after any draft legislation or reform is ultimately proposed and that such a process commence in advance of the reading of the draft legislation in Parliament.**

THE IBA'S POSITION - DETAILED LEGAL ANALYSIS

ISSUES

The IBA believes that the issue of on-reserve matrimonial property division on the dissolution of marital or common law relationships must be based on the traditional practices, customs and traditions of Indigenous people; the right of Indigenous people to develop solutions from within their communities; and the inherent right of Indigenous people to self-determination and self-government.

The legal basis for such recognition by Canada is not based exclusively in Indigenous communities' non-surrender of such rights but is also set out in the Royal Proclamation of 1763 and reaffirmed in section 25 of the *Charter of Rights and Freedoms* and in section 35 of the *Constitution Act*, 1982.

The IBA recognizes the complexity of the legal issues and the human rights dimension to the resolution of disputes arising out of the dissolution of marital or common law relationships on-reserve. The legal issues at the heart of the matter include:

- federal jurisdiction over "Indians and Lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act 1867* and "Marriage and Divorce" pursuant to section 91(26) of the same Act;

- provincial jurisdiction over "Property and Civil Rights", pursuant to section 92(13) of the *Constitution Act 1867;*

- whether the real property in question is held by a certificate of possession or by custom allotment;

- the status of the parties involved and whether they are "status" Indians, Band members of the reserve in question or of non-Indigenous descent,

and whether the relationship was a formal marriage, a common law relationship or same-sex relationship;

- the application of s.15 of the *Charter of Rights and Freedoms;*

- the application of s.25 of the *Charter of Rights and Freedoms;* and

- the application of s.35 of the *Constitution Act, 1982.*

We would note that an important and essential part of the equation may not exclusively be an equitable division of the matrimonial property between spouses but the right of children to live in the marital home. Any future reforms must recognize that the right of the child to a safe and secure home within the child's own community is paramount.

For the most part, the problems related to the division of matrimonial property on reserve flow from questions of jurisdiction, including the continued failure to recognize sufficient Indigenous jurisdiction.

In the IBA's view, the impact of this issue is significant and we provide a position by way of the recommendations contained herein for these jurisdictional issues for both short-term and long-term reform.

At the same time – as INAC through its consultation process can itself attest to – we caution that even the fairest and most open of minds will find it difficult to navigate through the maze of problems that have been created through the legal and legislative (i.e. statutory) framework leading up to this latest discussion on addressing this long-standing issue of division of on-reserve property.

The problems have emerged after more than a century of colonialism and the lack of Canada's action to honour existing treaty and constitutional obligations, as well as little considered legislation, policy and guidelines created to protect Indigenous families and provide for a fair and just protection of matrimonial property on-reserve on the dissolution of a marital or common law relationship.

In short, the current "crisis" as some have referred to it, has arisen not out of the lack of leadership from among First Nation communities – as has been alleged by some – but rather from the limitations placed on First Nation communities through the unique property structure Canada created under the *Indian Act* without consultation or input from First Nation communities themselves. Therefore, a well considered, well organized and serious commitment to obtaining stakeholder input into the resolution of this issue is a critical initiative.

CURRENT LEGISLATIVE FRAMEWORK

The protection, distribution and management of reserve lands are governed by the *Indian Act* and companion legislation like the *First Nations Land Management Act*, which provides Indigenous Nations with the authority to enact their own land management codes.

Pursuant to the *Indian Act,* parcels of reserve lands may be transferred to individual Band members by way of Certificates of Possession (CP). [1] A Band member must apply to the Band Council for a Certificate of Possession. The Band Council may approve the application by issuing a Band Council Resolution and submitting the application for approval to the Minister of Indian and Northern Affairs. The majority of Certificates of Possession are held by male status Indians and this imbalance becomes aggravated in specific situations where there is family violence involved in the dissolution of the marital or common law relationship. [2]

Should the spouse who is not named on the Certificate of Possession (usually the woman) wish to remain in the marital home or the land in question upon dissolution of the relationship she or he immediately finds themselves in a jurisdictional tug of war.

Neither spouse would have access to the ordinary provincially established legislative regimes dealing with the division of matrimonial property; as such matters are constitutionally under the authority of the provinces, however, the reserve lands upon which the matrimonial home is located are federal lands.

To compound this issue, in addition to the peculiarities of the division of powers between the federal and provincial governments, the *Indian Act* limits how on-reserve property can be divided. Typically, the value of the matrimonial home on-reserve is assessed much lower than a comparable home off-reserve and, ultimately, is not part of a net family property calculation meant to financially equalize the positions of the spouses upon the breakdown of a marriage.

In other words, because of the *Indian Act,* real property situated on a reserve cannot automatically be considered property owned in common when there is a marriage. Spouses do not automatically have an undivided one-half interest by reason of their marital status. Common law presumptions or provincial statutory provisions that give spouses a share in the matrimonial home despite legal title documentation do not apply on-reserve because the individual land allotment system is entirely based on federal statute.

The Indian interest in “Lands reserved for the Indians”, including Indian reserve lands is a collective interest, not an individual one, and there is no individual ownership of the lands but only statutory recognized rights to individual allotments.

As a result of the peculiar nature of Indian lands, the normal legislative regime regarding possession and ownership of the matrimonial property does not apply. However, provincial courts have circumvented this legal dilemma by valuing the property on reserve and issuing compensation orders that provide spouses with their share of the matrimonial property.

Although these mechanisms by the provincial courts are a creative legal attempt to equalize the disharmony of how real property is legally managed in a typical relationship breakdown, the problem of enforcement remains.

If the spouse is an Indian pursuant to the *Indian Act*, she or he can engage in legal proceedings to attach the property situated on reserve belonging to the ex-spouse. These proceedings are costly, but they have been known to work. However, these same legal enforcement remedies would not be available to a spouse who is not an Indian pursuant to the *Indian Act.*

In all, the legal reality is that provincial courts do not have the authority to grant a spouse and her or his children exclusive possession of the matrimonial home and exclusive use of matrimonial property where such property is situated on reserve, whether held by Certificate of Possession or custom allotment.

Consequently and typically, women and children may be placed in vulnerable and potentially harmful situations when confronted with marital break-down in terms of economic viability. In a situation where there are power imbalances and/or family violence in the dissolution of the marital or common law relationship other issues like the Indian “status” of the spouse involved could result in further inequities if they were originally a member of another Band or if they are of non-status.

Without family or Band Council support to maintain the matrimonial home many spouses and children end up moving into the overcrowded homes of relatives or into off-reserve social housing.

Socio-economic issues faced by First Nations, such as a small land base and a known lack of adequate federal funding for housing on-reserve, compound the problem where Band Councils and Band members feel compelled to protect the existing limited resources of the First Nation. Moreover, Indigenous women often do not have the education to secure employment to support themselves and the children resulting in the beginning of a cycle of dependency and oppression which can take generations to overcome.

Moreover, confusing jurisdictional issues in family law for Indigenous people lends the law to a maze of unending pathways to solutions which may well arrive at yet another series of problems created by the solutions.

Simply amending the *Indian Act* to allow for the application of provincial-like regimes will not resolve the oppressive nature of an alien form of regulation imposed on Indigenous lives through the Act itself.

While there may be necessary short-term options available to address the issue as set out below (e.g. issuing Certificates of Possession in the name of the children), a long-term solution would, however, necessarily center around the recognition of jurisdictional space for Indigenous governments in all facets of governing, including the area of matrimonial property on-reserve and dispute resolution based on the traditions and customs of the Indigenous society in question.

Indigenous peoples have a strong desire to control their own destiny and revitalize their Nations through their culture, language and traditional

governments and this should be recognized as a source of wealth to Confederation.

Closely connected with this idea is the desire of Indigenous Nations to govern themselves without the oppressive hand of non-Indigenous values and principles which has been unilaterally imposed since the early 19th century.

> ***IBA Recommendation #1***
> ***INAC should not insist on legislative changes to address the issues of MRP; instead it should address issues related to First Nation self-government and self-determination with First Nations in a bi-lateral process. A start would be to fulfill its commitments under the First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nation Government (2005) which would enable First Nations and the federal government the opportunity to address the issue of matrimonial real property amongst other important governance issues.***

INDIGENOUS LAWS, PRACTICES, CUSTOMS AND TRADITIONS

A cultural value of Indigenous people across this country is the right of a child to live on the land in which she or he is born. This connection to the land, for example, is recognized in ceremonial acts of the Secwepemc who bury the umbilical cord at the foot of a tall, straight and strong tree, with the hope that the child will grow up to be tall, straight and strong like the tree and will always come back to the place of its birth. In the cacophony of legislation and non-existent policy related to the division of matrimonial property, the Indigenous children are left out of the equation as they appear to be left out of the current discussion on MRP. This is because the division of matrimonial property in Canadian law is

based on principles of fair and equitable disposition of the property between the spouses, rather than maintaining cultural values like connection to the land of birth and thereby giving real meaning to Canada's own family jurisprudence in relation to the "best interest of the child".

Some consideration should be given to the recognition that Indigenous children, as much as their parents, have a right to share in the family property. Upon marriage break-down, children could be granted an interest in the matrimonial property and such interest could then be maintained in the form of a legal trust until the children are legally able to access the trust. In this way, the children would have their long-term interests protected and cultural values may be incorporated as part of the solution.

However, these solutions are long-term and will not resolve the inequalities confronting Indigenous families on a daily basis. Some communities are developing restorative justice models to resolve internal conflicts through systems based upon traditional values.

These processes are beginning to work well in the resolution of disputes, including disputes related to matrimonial property, but they need to be fully supported. Canada can support Indigenous people in their decolonization processes by supporting restorative justice projects with core funding. There are many projects in Canada where the success rate is phenomenal because the people are resolving the problems from within their communities rather than having cookie-cutter solutions imposed from the outside. [3]

It is important to understand that the creation of an Indigenous-based dispute resolution process or model to provide culturally appropriate family dispute resolution services must be based on the culture of the specific community. Initiatives based on models of other Indigenous peoples' culture and values are

not normally transportable from one Indigenous community to another. In other words, there is no pan-Indian and thereby no pan-Indian resolution. Even more so, models with non-Indigenous values and principles are not appropriate.

Culturally appropriate services often require research into the traditional laws, customs and practices, traditional dispute resolution mechanisms and sanctions, and the development and implementation of the service.

Community consultations with the intended clients provide the mandate for the service but the development of guidelines on how the services are delivered will take time and resources.

Training individuals in dispute resolution, quality assurance and evaluation, management and administration, power imbalances and family violence, and facilitation and negotiation skills requires resources not always accessible from Band education programs or other Band program funding. Band or Tribal Council restorative justice initiatives derive their funding from a variety of funding agencies and it is a constant struggle to maintain such services.

The aforementioned projects require financial support in order to further develop capacity of Indigenous communities to take on the responsibility of resolving disputes through institutions built by and for Indigenous people based on foundations of traditional laws, customs and practices in their communities that include the protection of Indigenous women and children.

Indigenous communities have the capacity and the desire to resolve disputes within their communities including family disputes related to the division of assets. With proper resources and training, there are some potential solutions to the MRP issue readily available.

An interim measure to address this issue in the immediate would be for Band Councils to issue the Certificates of Possession in the name of the status children or to an aunt or grandparent(s) in trust for the children if none of the children have status.

Indeed the IBA takes this matter of revitalizing traditional methods of dispute resolution seriously enough that our 2008 Annual Conference is being developed around this very issue through presentations from various academics, leaders and community members who are either practicing traditional dispute resolutions or who are developing the same in a modern paradigm.

Therefore, based on the above and recognizing that relationship breakdowns on reserve in relation to matrimonial real property is by law required to be handled differently to avoid a negative outcome for the family, in particular recognizing that the children have no decision-making power in a relationship breakdown; the IBA makes the following recommendations on an interim basis with the longer term approach of the full recognition of Indigenous legal customs and traditions in Canada's jurisprudence.

IBA Recommendation #2

While self-governance policies and/or laws are being considered bi-laterally, First Nations are in a position to address some of the matrimonial property issues consistent with their right of self-government and the rights of First Nations to control the use and allocation of their lands. For example:

a) when a relationship breaks down, Chief and Councils in Canada can issue Certificates of Possession for matrimonial homes in the names of the children of a marital relationship

to ensure that the children remain in possession of the matrimonial home and thereby the custodial parent will remain in the home with the children so long as they require parental care and supervision.

b) That Chief and Councils, for any children who are not Indians in accordance with the provisions of the Indian Act and thereby unable to be named on a Certificate of Possession but who are living in a matrimonial home on reserve, can issue Certificates of Possession for the matrimonial home in the name of the closest related and oldest aunt or grandparent(s) of the children who is an Indian under the terms of the Indian Act and can lawfully hold a Certificate of Possession.

CONSULTATION PROCESS

Canada cannot address the MRP issue by simply making changes to existing legislation as they did with Bill C-31. Such an approach will only seek to perpetuate the inequalities or simply delay them. The IBA does not support the creation of legislation that is unfair or discriminatory in its implementation, inconsistent with the collective rights of the community, or inconsistent with Indigenous customary practices on marriage and dispute resolution.

The IBA does not want to see legislation enacted which promotes individual rights at the expense of collective rights, nor would we support legislative initiatives implemented to continue a colonialist mandate that does not recognize or respect First Nations' inherent rights to self-determination and self-government.

The IBA views the federal government's role as supportive in nature rather than dictatorial in addressing the continued breakdown of community and family within

First Nation communities and, as such, the federal government's approach must be pro-actively supportive of First Nations and founded on recognition and respect for Indigenous customs and practices.

The IBA also views the federal government as responsible for ensuring sufficient resources to First Nations which are inclusive of our recommendations in regard to any legislative or policy initiative.

The IBA is aware that INAC, through its Matrimonial Real Property Group in the Women's Issues and Gender Equality Directorate, has commenced a pre-legislative consultation process. To that end, the IBA promotes the principle that any reform undertaken by INAC will be done so in a manner that is consistent with the consultation requirements set out by the courts [4], and carried out under the principles of fairness, kindness and respect.

In *Delgamuukw v. British Columbia* the Supreme Court of Canada stated:

> Of course, even in these rare cases when the minimum acceptable standards is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal People whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal People. [5]

<u>IBA Recommendation #3</u>

In the alternative, should INAC insist upon pursuing legislation on the issue of matrimonial real property, the legislation should be substantively reflective of the principles of legal pluralism by ensuring Indigenous practices and customs in relation to marriage and family breakdown are recognized as well as recognizing Indigenous methods of dispute resolution.

IBA Recommendation #4

Should Canada consider legislation or policy relating to MRP, a new and meaningful consultation process commence immediately after any draft legislation or reform is ultimately proposed and that such a process commence in advance of the reading of the draft legislation in Parliament.

CONCLUSION

It is important to note that in the past, attempts at reform related to the *Indian Act* have not always been controversial, particularly the reforms suggested in the Penner Report, the Aboriginal Justice Inquiry of Manitoba, and the Report of the Royal Commission on Aboriginal People (RCAP).

The substance of those reports were accepted by Indigenous Peoples because the process of developing the substance of those reports was fair, open, accountable, democratic and included the full participation of Indigenous People in a way that was respectful and dignified.

Moreover, there are compelling arguments that the CP system itself is a violation of the Band's interest in reserve lands as a protected Aboriginal right. This conclusion is supported by a synthesis of *Delgamuukw* and the recent *Osoyoos* case.[6] Band's arguably have an inherent Aboriginal right to their reserve lands that includes the right to control the uses to which that land is put.

In closing we wish to reiterate that the IBA firmly believes a fair distribution of on-reserve matrimonial property on the dissolution of marital or common law relationships must be based on the culture and traditions of Indigenous people, the right of Indigenous people to develop solutions from within their communities, and the inherent right of Indigenous people to self-determination and self-government. While this will be a difficult task to accomplish, it can be achieved

further to the IBA's considered recommendations with a strong commitment from all stakeholders.

NOTES

1. Lower Nicola Band v. Trans-Canada Displays Ltd., [2000] 4 Canadian Native Law Reporter 185, 2000 BCSC 1209 (BCSC).

2. Royal Commission on Aboriginal Peoples, *Perspectives and Realities, Volume 4* (Ottawa: Minister of Supply and Services Canada, 1996) at 51.

3. Native Counseling Services of Alberta. (2001). *A cost-benefit analysis of Hollow Water's community holistic circle healing process.* Ottawa, ON: Solicitor General of Canada, Aboriginal Corrections Policy Unit.

4. Indigenous Bar Association Presentation to the Standing Committee on Aboriginal Peoples Affairs, Northern Development and Natural Resources – March 21, 2003 Re – Proposed First Nations Governance Act

5. Delgamuukw v. British Columbia, [1998] 1 Canadian Native Law Reporter 1, at 79.
6. *Osoyoos Indian Band v. Oliver (Town)* [2002] 1 Canadian Native Law Reporter 271 (S.C.C.)