Report

The Recognition of Custom Allotments in First Nation Reserves: Considerations for First Nation Councils and Courts in the Context of Applications under *FHRMIRA*

By Catherine Fagan and Elizabeth Zarpa

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www.arbutuslaw.ca

Main Office: 132-328 Wale Road · Victoria · BC · V9B 0J8 Phone: 250-940-1881

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Table of Contents

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Introduction

In this Report, which was commissioned by the National Aboriginal Lands Managers Association, the authors discuss the recognition in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[1] (hereafter *"FHRMIRA"*) of the rights or interests First Nation members have in homes or buildings that were granted to them pursuant to the customs and traditions of their First Nation. These types of rights or interests, which are sometimes referred as "custom allotments", are not granted pursuant to the requirements of the *Indian Act,*[2] a recognized Land Code or other federally recognized instrument.

This recognition comes through the definition of a "right or interest" at section 2(1) of *FHRMIRA*. The definition of a "right or interest" in land or a structure includes, unsurprisingly, rights granted pursuant to the *Indian Act,* such as a Certificate of Possession. It also includes rights to land or structures granted under a Land Code enacted under the *First Nations Land Management Act*[3] or under a self-governance agreement signed with Canada. What is more novel for Canada is paragraph (c) of the definition which extends a recognized "right or interest" to include customary allotments granted entirely outside of any federally approved land-management regime:

> "an interest or right in or to a structure — that need not be affixed but that must be situated on reserve land that is not the object of an interest or right referred to in paragraph (a) — which interest or right is recognized by the First Nation on whose reserve the structure is situated or by a court order made under section 48."

[1] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.
[2] *Indian Act*, RSC 1985, c I-5.
[3] *First Nations Land Management Act*, SC 1999, c 24.

The area of emphasis in this section is homes or buildings "*which interest or right is recognized by the First Nation on whose reserve the structure is situated…*"

Although the topic falls somewhat outside the scope of this Report, the authors would like to point out that, unlike paragraph (a) and (b), the recognition of customary allotments extends only to a right in structures (i.e. buildings), but not to land. There is no clear explanation or justification for this limit in *FHRMIRA*, particularly if one of the purposes of (c) is to recognize Indigenous laws and Indigenous ways of governing. It is also relevant that the granting of structures in First Nations often goes hand in hand with the granting of land, and so this limit will likely result in confusion and court orders under *FHRMIRA* will, at times, be incomplete and unsatisfactory.

This Report will discuss what a custom allotment is, how common they are and what they look like in some communities. Keeping in mind, of course, that there are many variations in how First Nations govern and manage their lands. This Report will then focus on how Courts have historically treated custom allotments, and how they could or should treat them moving forward, particularly in the case of an application under *FHRMIRA*.

This Report also describes certain practices that First Nations could consider incorporating into their internal land management practices, in a way that is adapted to their legal orders. The hope is that these practices would increase the chance that individuals who own homes or buildings based on customary allotments have those interests recognized through a *FHRMIRA* application.

What is a Custom Allotment?

A custom allotment can generally be described as a right to occupy a building or land that is recognized or granted according to a First Nation's own laws or practices, and which is outside of a provincial or federal legislative scheme. For example, an allotment could be granted through a resolution of the First

Nation's council or through another written instrument or oral custom of the First Nation.[4] The approval of the Minister of Indigenous Services is not requested and custom allotments are not registered under the *Indian Act* registry because a Certificate of Possession is not issued.[5]

A First Nation's system for granting rights in land and buildings is an exercise of their inherent right to self-govern. These systems are part of the Nation's own Indigenous laws and legal systems. The exact mechanism of how allotments are made can vary enormously.

In a 1991 article Mary Ellen Turpel-Lafond, Indigenous lawyer, legal scholar and former judge, wrote about custom allotments and how the requirements of the *Indian Act* are incongruent with First Nation practises of governing their territories:

> "The system regulating Indian land allotments is not uniform across Canada. Some bands retained customary systems of land allotment and, while these are not expressly contemplated by the *Indian Act*, they have been recognized and continue to be followed. Under these systems, certificates [of possession] are not issued, and land holding is based on kinship and genealogy consonant with tribal practise. The provisions of the *Act* govern nearly all the 633 bands in Canada. The system of landholding it decrees is a colonialist scheme designed for the complete regulation of Indian life in order to facilitate "orderly" Canadian settlement and the "protection" of the Indians. It was not devised in consultation with aboriginal peoples, nor does it coincide with any traditional practises. No tribe issued papers to its members to confirm possessory title: in close-knit tribal communities, everybody knows where each family lives, hunts or gathers food."[6]

[4] Gary Campo and Holly Vear, *Land Interest in Reserves* (Native Courtworker and Counselling Association of BC, Aboriginal People and the Law Programme, April 2011) Online: http://www.woodwardandcompany.com/wp-content/uploads/pdfs/LandInterestsinReserves-April142011-FINAL.pdf at 1.
[5] Canada, Indian Affairs and Northern Development Canada, *Understanding the Regulatory Environment for On-Reserve Lending: Frequently Asked Questions* (January, 2005) Online: https://www.cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/msc_onreservelending_en.pdf at 5.
[6] Mary Ellen Turpel, "*Home/Land*" (1991) 10:1 Can J Fam L 17, at 23.

In recognizing custom allotments in *FHRMIRA,* Canada was attempting to address, to a certain degree, the ongoing challenges posed by the confines of the *Indian Act* in the management of reserve lands. It is a recognition that First Nations have governed themselves and their territories since time immemorial and that it is important to recognize that fact within Canadian legislation.

Purpose behind Recognizing Custom Allotments in *FHRIMRA*

The authors of this Report surmise that Parliament likely had two principal goals in mind when it decided to include custom allotments in *FHIRMIRA*:

1. *To ensure fair treatment for First Nations members and their spouses who live in communities where custom allotments are the only way in which rights are granted in land and buildings*

To leave these custom allotments out of the understanding of what 'family property' is under *FHRMIRA* would deny protections to those who, in good faith, see themselves as owners of their homes. In most cases, it is not only the individuals who see themselves as owners. Their families, neighbours, community and Council also recognize them as the owners of the land or home. It is a great injustice for Courts or other entities to refuse to recognize these types of interests because they are granted according to an Indigenous legal order that is not fully understood or incorporated into civil or common law legal systems.

2. *To increase recognition of Indigenous legal systems of land/housing management in Canadian law*

In many cases, custom allotments follow clear, accepted and understood legal frameworks for land management. In other words, these First Nations do not follow Canada's legal regime put in place for them via the *Indian Act* but follow their own Indigenous laws and legal traditions. The Canadian government, the Supreme Court of Canada, and the international legal community have all recognized, in various ways, the inherent right for Indigenous Nations to practice and have respected their own legal systems. However, the respect for this legal principle has been limited in Canada. *FHRMIRA*, in

albeit a limited way, has started to open the door to recognizing the inherent validity of these Indigenous land management systems.

Indigenous law v. Aboriginal law

If one of the purposes of recognizing custom allotments in *FHRMIRA* is for Canada to begin to give concrete legislative recognition to the diverse legal orders of Canada's Indigenous peoples, it is about time.

The Supreme Court of Canada has recognized that, prior to the arrival of the Europeans, Indigenous populations throughout Canada lived in and occupied their territories with their own laws.[7] The Supreme Court of Canada[8] also acknowledged that the *Constitution Act, 1867*[9] did not extinguish Indigenous people's inherent right to self-government and that this right continues today and is affirmed by section 35 of the *Constitution Act, 1982.*[10]

Although aboriginal law and Indigenous law are connected, they are also very distinct from one another. Indigenous laws are the internal laws of an Indigenous Nation, and they are distinct from one Nation to the next. Whereas, aboriginal law are laws that have been predominantly written and interpreted by non-Indigenous populations within settler governance structures to apply to Canada's Indigenous population and lands.

Professor John Borrows, Canada Research Chair in Indigenous Law at the University of Victoria, highlights that Indigenous laws can be derived from different sources such as sacred law, natural law, deliberative law, positivistic law and customary law.[11] These different sources can be broadly divided as follows:

[7] *R. v. Van der Peet,* 1996 CanLII 216 (SCC), [1996] 2 SCR 507; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.
[8] *R. v. Pamajewon*, 1996 CanLII 161 (SCC).
[9] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.
[10] *The Constitution Act, 1982*, *Schedule B to the Canada Act 1982 (UK)*, 1982, c 11,
[11] John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press: 2010).

- Sacred laws, which can be viewed as spiritual principles, from the Creator, creation stories and ancient teachings.
- Natural law, which can be viewed as those laws that are "written on the earth" where reasoning, guidance and analogies are based on close observations of, and experiences interacting with the physical world, including the land, landmarks, water, animals, natural cycles and natural consequences.
- Deliberative laws, which are developed through conversing with one another to develop and understand laws.
- Positivistic law, which are the laws that people follow based on an authoritarian rule.
- Customary law, which can be viewed as common practises developed through patterns of interaction between people or a community.[12]

These are examples of some of the sources of Indigenous laws to demonstrate the breadth of what we mean when we reference Indigenous laws and legal orders.

Overview of Custom Allotments in First Nations Across Canada

How common are custom allotments in First Nation communities?

There are many First Nations who allocate reserve land or buildings outside the *Indian Act* or other federally or provincially recognized regimes. It is estimated that there could be tens or even hundreds of thousands of customary land holdings on First Nation reserves. With no central registry of these landholdings, however, the true number is unknown.[13]

[12] Hadley Friedland, Jessica Asch and Val Napoleon, *A Toolkit for Matrimonial Real Property On-Reserve Dispute Resolution*, (University of Victoria Law: Indigenous Law Research Unit, 2015) at 53-54. Online: http://coemrp.ca/wp-content/uploads/2015/12/Final-MRP-DR-Toolkit-Version-1.0.pdf

[13] Tom Flanagan & Katrine Beauregard, *The Wealth of First Nations An Exploratory Study*, (Centre for Aboriginal Policy Studies, Fraser Institute, June 2013), at 9. Online: https://www.fraserinstitute.org/sites/default/files/wealth-of-first-nations.pdf ; See also, Douglas Sanders, "*The Present System of Land Ownership*", paper presented to the First Nations' Land Ownership Conference, September 29-30, 1988 at the Justice Institute of British Columbia.

The 2003 report entitled "*A Hard Bed to Lie In: Matrimonial Real Property on Reserve: Interim Report of the Standing Senate Committee on Human Rights*,"[14] (the "Interim Report") sets out that five Ontario First Nations, two First Nations in Alberta, as well as most of the First Nations in Manitoba allocate reserve land according to their own customs. The Committee stated that 33 other First Nations in Ontario, one in Alberta and two in Saskatchewan have hybrid systems which combine *Indian Act* Certificates of Possession and custom allotment.

Although we surmise that it is just as common in other provinces and territories, the Committee had no direct information about other First Nations that practise custom allotments.[15] It is a common theme among many academic papers and reports touching on custom allotments that there is a lack of information in regards to how exactly custom allotments are practised and which First Nations practise them.

How are custom allotments granted?

Although we know that custom allotments are common among First Nations, there is little publicly available information that reviews the exact mechanisms for granting allotments across multiple communities. It appears that the majority of First Nations follow unwritten rules or ways-of-doing.[16]

For many communities, there is a Council Resolution adopted, but the content or meaning of the resolution differs from community to community. In some communities, parcels (or lots) of land may be surveyed, but in many communities they are not. In some communities, the dimensions of the lot are drawn or described in a written document. In others, there is a communal unwritten understanding of the boundaries or limits of the lot of land, as well as the identity of who has rights associated with the land or house.

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[14] Standing Senate Committee on Human Rights, *A Hard Bed to Lie In: Matrimonial Real Property on Reserve: Interim Report of the Standing Senate Committee on Human Rights*, November 2003. Online: https://www.sencanada.ca/Content/SEN/Committee/372/huma/rep/rep08nov03-e.pdf [Interim Report].
[15] *Ibid* at 24.
[16] *Ibid.*

In fact, it would be difficult to provide specific details as to how custom allotments are granted across Canada without more direct research being carried out with willing First Nations. To be sure, each First Nation who grants custom allotments will have a range of answers to the following questions:

- How is a person or family chosen to be granted land or a house?
- Who (person or entity) makes the decision?
- Is the decision written or oral?
- Whether the decision is oral or written, how are those decisions remembered and passed on so future generations are aware?
- What kinds of rights or limits come with the allotment? (e.g. How can the land or house be used? For what purposes? What can be put on the land?)
- To whom can the land or house be transferred? And how is the transfer accomplished?
- How and when can a custom allotment be taken away?
- How is the land or house passed down to subsequent generations?
- What are the rights of other family or community members in that land or house?
- What dispute resolution mechanism is in place if there is a conflict?

Example of a Customary Indigenous Land Management System

Although it is difficult to find publicly accessible information on the specifics of custom allotment regimes in Canada, there are some relevant sources of information. Below we provide an example of the Tsimshian, an Indigenous Nation exercising their inherent right to manage their own lands. The information for this example came from a paper by Indigenous law academics Val Napolean and Emily Snyder entitled "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory".[17] The information is limited in terms of detail on how the regime operates at an individual or case-by-case level, but it is still a relevant example as it demonstrates the stark difference in approach to land management

[17] Val Napoleon and Emily Snyder, "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) 41 at p. 59.

under the *Indian Act*, and how Indigenous legal orders do not fit easily into the confines of common or civil law legal traditions.

The Tsimshian territory in Northern British Columbia can be divided into three regions: the northern, southern and interior. Napolean and Snyder's paper focused on the northern region, consisting of the communities of Metlakatla, Kitselas, and Kitsumkalum. Their legal, political and social structure consists of four clans: *Laxskiik,* (Eagle), *Laxgibuu* (Wolf), *Gispwudwada* (Killer Whale), and *Ganhada* (Raven). These clans have extended groupings called "houses" and in English each house has a head chief and a number of sub-chiefs.[18]

> "The individuals in the extended family groupings are considered members of their mother's house under the head chief's name. Each head chief's name covers a particular territory, which the house owns according to Tsimshian law and usually contains watersheds, valleys, and mountain sides, and for some, coastal regions. The number of houses in a lineage may vary over time, as houses divide and amalgamate in order to maintain their population bases and fulfill their responsibilities to their kinship networks and territories. While the chief's name and territorial connections remain, despite contractions and expansions of the house, the efforts and behaviours of that name-holder cause an increase or decrease in status. These territorial connections are maintained even when the house membership is depleted, and it is intentionally subsumed by a larger, closely aligned, and related house of the same clan; when the house membership again increases, it may divide along original house lines with its lineages and territories intact. Political alliances and strategic cooperation were vital within non-state and decentralized societies such as the Tsimshian, as there were no centralized authorities or bureaucracies designated to take up the responsibilities of law and governance."[19]

[18] *Ibid* at 59.
[19] *Ibid* at 60.

Each house of the Tsimshian owns an *adawx,* which is an oral record of the origins and migrations of the kinship groups to their current territories, as well as covenants made between people and their land. The recounting of the *adawx* at pole-raising feasts is a public formal legal event, to ensure continuity and accountability. The version of the recounted *adawx* can be publicly challenged and amended according to Tsimshian civil procedure.[20]

Decisions within and throughout houses are legally recorded publicly through the *adawx,* as well as though crests, songs, poles, and other types of oral histories.[21] Tsimshian property law also recognizes the importance of kinship networks by having differing levels of agency and legal capacity within and outside of a house group:

> "Tsimshian individuals have agency and legal capacity in the house group, but outside the house, the house holds the legal capacity and is the legal actor in relation to other house groups. This kinship system creates a legal order."[22]

The Tsimshian land regime is a wonderful example of a complete legal order that operates independently of Canada's common law or *Indian Act* regimes. It demonstrates the complexity and beauty of many of the land regimes of Indigenous Nations in Canada.

When compared with common and civil law property regimes, we see that European ideas of ownership and property come from a very different worldview. Canada has a fantastic breadth of co-existing legal systems. Unfortunately, except for the common and civil law traditions, legal pluralism in Canada has not adequately embraced the legitimacy of these legal orders. Therefore, conflicts arise, often around land issues, which can end up in Court. Once within the Canadian Court system, the Indigenous legal systems are often ignored and suppressed by the perceived legal weight of *Indian Act* requirements.[23]

[20] *Ibid* at 60.
[21] *Ibid* at 89.
[22] *Ibid* at 89.
[23] *Supra note* 14 at 29.

Courts' Treatment of Custom Allotments on Reserve

Keeping in mind Canada's historical inability to integrate Indigenous land management systems, we now move to a review of how Courts in Canada have understood and treated rights on reserve that were granted according to the customs and laws of the First Nation.

Lower Nicola Band v Trans-Canada Displays Ltd

In *Upper Nicola Band v Trans-Canada Displays Ltd,* [24] Mr. Shuter was a member of the Upper Nicola Band who died in 1994.[25] Shuter claimed rights to 80 acres on the Joeyaska reserve of the Upper Nicola Band based on his family's traditional and customary use and occupation of the land since 1968.[26] In 1988, Shuter signed a 15-year renewable agreement with Trans-Canada Displays Limited to use a portion of the 80 acres to display billboards.[27]

After Shuter's death, his estate claimed the 80 acres of land within the Joeyaska reserve based on traditional use and occupation of the land.[28] The estate claimed that Shuter had rights to the land because of a land trade Shuter made with George Spahan in 1968. Saphan, a member of the Coldwater Reserve, inherited six acres of land on the Joeyaska reserve from his father However, because he was not a member of the Joeyaska reserve, Saphan was not permitted under the *Indian Act* to inherit the lands.[29] At a similar time, Shuter attempted to purchase property on the Coldwater Reserve and he too was prohibited from having any interest in the land because he was not a member of that band.[30] As a result, Saphan and Shuter decided to trade their land interests in 1968. Neither Saphan nor Shuter registered their land interests within the requirements of the *Indian Act*.[31]

[24] *Lower Nicola Band v Trans-Canada Displays Ltd*, [2000] BCJ No 1672, 2000 BCSC 1209, [2000] 4 CNLR 185, 98 ACWS (3d) 954, [2000] BCTC 620 [Lower Nicola Band v Trans-Canada Displays Ltd].
[25] *Ibid* at para 6.
[26] *Ibid* at para 4.
[27] *Ibid* at para 5.
[28] *Ibid* at para 6.
[29] *Ibid* at para 11.
[30] *Ibid* at para 11.
[31] *Ibid* at para 13.

The First Nation sought a declaration that the Shuter estate and Trans-Canada Displays Limited had no lawful interest in the Joeyaska reserve lands and that the two parties were trespassing and must vacate the Joeyaska reserve lands.[32]

The Court ruled in favour of the First Nation and declared that Shuter was not in lawful possession of the six acres received in 1968 because Saphan's father was not in lawful possession of the land when he bequeathed it to his son.[33] Given that Saphan was not in lawful possession of the six acres, he could not bequeath it to Shuter.[34] Documents from 1987 that the Shuter estate relied upon to prove the allocation of the 80 acres showed that Shuter was not allotted the land individually and they did not provide an outline of the parameters of the allocation and there was no approval of the interests by the Minister of Indian Affairs [now Minister of Indigenous Services].[35]

Given that none of the *Indian Act* requirements were met for either the transfer of the six acres to Saphan, and for Saphan to Shuter, then the land transfers were of no effect. Shuter had no legal interest in the 80 acres.[36] The Court held that the requirements in the *Indian Act* were clear and were to be strictly applied.[37] It went further to clarify that ownership of land based on traditional or customary use of land did not exist independent of the interest created by the *Indian Act*.[38]

The Court consequently declared that the Shuter estate and Trans-Canada Displays Limited were trespassing on the reserve land. It also found that the Shuter estate *could* make a claim to the six acres of land for residential purposes based on traditional and customary occupation through an application to the First Nation.[39] This application process would have to include a land survey done by the Department

[32] *Ibid* at para 9.
[33] *Ibid* at para 142.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid* at para 143.
[37] *Ibid* at paras 141-143
[38] *Ibid* at para 151.
[39] *Ibid* at para163.

of Indian Affairs to ensure compliance with the *Indian Act* followed by an issuance of a Certificate of Possession.[40]

The *Upper Nicola Band v Trans-Canada Displays Ltd* case is an example of how customary allotments within First Nations communities exist separate and distinct from the confines of the *Indian Act*. Yet, the individuals who depend on custom allotments in their assertion of a right to land or housing have no (or at least had none before *FHMIRA*) recognized legal ownership, no legal recourse and no right to the value in those land or buildings. Cases like this show just how much of a failure the *Indian Act* has been to create a fair and acceptable land management regime.

Crowchild v Tsuu T'ina Nation

In 2017, the Federal Court dealt with a similar issue in *Crowchild.*[41] This case related to customary allotment of reserve land as well. However, the Court handled the issue differently than in the *Upper Nicola Band* case. Like many others, Tsuut'ina is a First Nation that does not allot land under section 20 of the *Indian Act.* Further, it has no policies, bylaws or procedures adopted by its Council that set out the process for land allotment. Rather, the Council allocates and reallocates reserve lands through their own internal processes and these allocations are dealt with on an *ad hoc* basis, depending on the individual context as necessary or needed.[42] Once a land allocation is made, a directive is issued by the Council. In this case, the applicant challenged two directives dealing with land allotments issued by the Council.

In the 1940's and 1950's, the Council issued Harold Crowchild hundreds of acres of land. In 1955, Harold abandoned his wife, Violet Crowchild and their children. Violet and her children continued to reside on the land. The applicant, Sandra, Crowchild, is Violet and Harold's daughter. The applicant lived her entire life on the allotted land with her mother until her mother's death in 2014.[43]

[40] *Ibid*.
[41] *Crowchild v Tsuu T'ina Nation*, [2017] FCJ No 975, 2017 FC 861, [2017] ACF no 975, [2018] 2 CNLR 85, 2017 CarswellNat 5643.
[42] *Ibid* at para 4.
[43] *Ibid* at para 5.

According to Tsuut'ina custom, it was understood that Violet would have the right to continue to use the land. In the 1970's, several years after Harold left the community, the Council granted 212.4 acres of land to Violet. In 1994, Violet consented to an allotment of 27 acres of land to Emmet Crowchild, her grandson. Emmet built a fence outside of the parameters of the 27 acres and Violet sought relief from the Council to have the fence removed. The request was successful, and the fence was removed. Later, Emmet was elected onto the Council.

In 2014, the applicant's half sister, Regina Crowchild, was granted the right to build a house by the Council, but she did not have any land to build on. It was Tsuut'ina tradition to speak with her family about using a piece of land to build her house, but this was unsuccessful. It was also custom to take up the issue with the Land Manager, but this too was unsuccessful.

It then went to Council, where two directives were issued in 2015 to allot Regina Crowchild 25 acres of the land occupied by the applicant.

In the court application, the applicant claimed that the process was unfair because she wasn't notified of the decision, nor was she given the opportunity to share her views. The applicant also argued that there was a reasonable apprehension of bias because Emmet Crowchild was on Council when the decision was made, and he had a personal interest in the outcome, as he was related to Regina. The applicant wanted the directives by the Council to allot land to Regina Crowchild reversed and the matter referred back to Council with directions.

The Court granted the application for judicial review, the directives were set aside, and the issue was sent back to the Council for review.

The Federal Court found it had jurisdiction to hear matters before Chief and Council that were of a "public" nature, regardless of whether the directive was made pursuant to the *Indian Act*, a local by-law or involved the application of a custom or practise of the First Nation.[44]

The Court then found that the process was unfair to the applicant because she was not given sufficient notice by the Tsuut'ina Council of the land allocation meetings. The applicant was not provided a reasonable opportunity to state her case and, as such, the Tsuut'ina Chief and Council breached procedural fairness.[45]

The process was also tainted by a reasonable apprehension of bias because Emmet Crowchild took part in a key meeting where the land allocation in question was being discussed.[46]

Given the above, the Court overturned the two directives of the Council and remitted the issue back to Council with no binding directions, but stated:

> "In light of this and given the respect which is due to the traditions and customs of Tsuut'ina, I decline to issue any binding directions on the parties. What is clear from these reasons is that Tsuut'ina must find a means of ensuring that those whose personal interests are directly affected by these sorts of land allocation decisions have an opportunity for meaningful participation in the process. On the evidence before me, this appears to be the accepted custom and tradition of Tsuut'ina. Further, Tsuut'ina must seek to avoid, if at all possible, the involvement of anyone whose interests are directly affected by the decision in the actual decision-making process. It is for Tsuut'ina to decide how to respect these minimum procedural rules within the exercise of their customs and traditions."[47]

[44] *Ibid* at para 27.
[45] *Ibid* at paras 37-39.
[46] *Ibid* at paras 31.
[47] *Ibid* at para 60.

The *Crowchild* case illustrates that Courts have begun to give more deference to Indigenous laws and their processes respecting the customs and traditions of Indigenous people. However, without a clear legal federal framework for courts to look to and rely on, there is a limit as to how far the courts can go.

It is also evident from this case that Courts will not override fundamental principles of procedural fairness, such as the right to be heard and the right to not have anyone whose interests are directly impacted by the decision involved in the actual decision making process. When considering custom allotments under *FHRMIRA,* procedural fairness is important and will have to be considered.

Summary of Caselaw on Custom Allotments

The cases of *Upper Nicola Band* and *Crowchild* both dealt with First Nation members who claimed rights to reserve land through customary practises and traditional use and occupation. In *Upper Nicola Band,* the Court relied heavily on the requirements for Ministerial approvements and registration under the *Indian Act*. It found the land was not validly allotted to the respondents, given that the application for a Certificate of Possession was not sent to the First Nation and the requirements of the *Indian Act* were not met. It made a small effort to recognize the traditional use and occupation of part of the claimed land for residential purposes, but still found a Certificate of Possession would have to be issued for any rights to be legally recognizable in the land.

In the *Crowchild* case, however, the lack of a Certificate of Possession was not determinative of whether there was a legally recognizable interest in land. Instead, it accepted the general legal effect of land allotments made by Tsuut'ina through their own custom and practises. Still, the Court overturned two directives made by the Chief and Council allotting 25 acres of land to a member due to an apprehension of reasonable bias and because the applicant was not given reasonable notice of key meetings related to the land allotment. The Court did not give any binding directions to Council in how to conduct its reconsideration of the land allotment, in respect of Tsuut'ina's own customs, but it did require that those who have personal interests in the decision have an opportunity to meaningfully participate in the

process and that anyone whose interest is directly affected not have any involvement in the decision process.

The *Crowchild* case reflects a movement towards Courts recognizing and giving deference to a First Nation's customary practises in land allotment, which is separate from the practises of land allotment within the *Indian Act*. These are considerations to be taken into account when analyzing how to interpret First Nations land management and custom allotment practises, in the context of an application under *FHRMIRA*.

The Courts' Interpretation of Interests and Rights in Matrimonial Property on Reserve

There have been several court cases that looked at custom allotments in the context who has a right to the value of the home or who has a right to occupy the home in the case of divorce or death of one of the spouses. Given that we are analyzing custom allotments in the context of *FHRMIRA,* these cases are of particular relevance and may provide insight into how custom allotments can or should be considered in the context of an application under *FHRMIRA*.

George v. George

There was limited caselaw prior to *FHRMIRA* where Courts recognized possessory rights of First Nation members residing in their family home without the issuance of a Certificate of Possession under the *Indian Act*. In *George v. George*[48], a First Nations married couple lived in their home on reserve throughout their marriage and neither had a Certificate of Possession to the lot. When they divorced, Mr. George resided in the home and Ms. George moved off reserve. Ms. George sought a compensation order under the British Columbia *Family Relations Act*[49], for half the value of their home. The trial judge found that Mr. George had lawful possession of the home, under section 20(1) of the *Indian Act* even without a Certificate of Possession. Thus, it fell within their family property and Ms. George was owed half its value. Mr. George

[48] *George v George*, [1997] BCJ No 721, 91 BCAC 163, 30 BCLR (3d) 107, 27 RFL (4th) 81, 70 ACWS (3d) 20 [*George*].
[49] *Family Relations Act*, R.S.B.C. 1979, c.121.

appealed to the British Columbia Court of Appeal. The issues were whether possession of real property on reserve absent a Certificate of Possession could constitute a lawful possession of property under the *Indian Act* and whether a compensation order could be issued under the *Family Relations Act of British Columbia*.[50]

The Court of Appeal established that despite a Certificate of Possession not being issued to Mr. George, the loan issued by the Department of Indian Affairs and the Council to maintain and renovate the home reflected that the Council and the Department of Indian Affairs approved of the parties living in the home.[51] This was enough evidence for the Court to determine that the matrimonial home was lawfully in possession of Mr. George under section 20(1) of the *Indian Act.* Therefore, a compensation order was issued for Ms. George.[52] The Court stated:

> "The decision of the Supreme Court of Canada in *Derrickson v. Derrickson*, [1986] 2 C.N.L.R. 45, makes it clear that while a court cannot grant an order pursuant to s.52 of the *Family Relations Act* which purports to grant or alter any interest in real property in reserve lands, there is no impediment to a court determining whether an interest in real property on reserve lands, by reason of its use for a family purpose, falls within the definition of "family asset" under s.45 of the Act, and if so, making a compensation order under s.52(2)(c) for the purpose of adjusting the division of property between the spouses. The parties' use and occupation of the former matrimonial home and the property on which it was located met the "use" test in s.45(2) of the *Family Relations Act* and therefore the property in question was a "family asset". Based on *Derrickson,* it was open to the trial judge to grant a compensation order to the wife in relation to the husband's right to use and occupy the property."[53]

[50] *Supra,* note 48 at para 5.
[51] *Ibid* at paras 34-39.
[52] *Ibid* at para 42.
[53] *Ibid* at para 1.

Hepworth v. Hepworth

In *Hepworth v. Hepworth,*[54] the Nova Scotia Court of Appeal dealt with a similar issue as in the *George* case. Mr. Hepworth was a First Nation member and Ms. Hepworth was a non-member. The family home was constructed and situated on Mr. Hepworth's reserve. The Band provided the lot, infrastructure and labourers, plus a $27,500 grant to build the home. Mr. and Ms. Hepworth spent $19,500 of their own money and repaired the home throughout the years they were married.[55]

On appeal, the issues were whether Mr. Hepworth was lawfully in possession of the matrimonial home without a Certificate of Possession and if the trial judge erred in issuing a compensation order to Ms. Hepworth to compensate her for half the value of the home. The Court followed *George* and established that:

> "Here, it was the Band which provided Mr. Hepworth with the land, workers to build the home, necessary infrastructure, a subsidy and, over the years, some reimbursement for renovations and repairs carried out by the parties. The parties lived on the property, undisturbed, for over a decade. There was no suggestion that the Band ever had, or now has, any concerns regarding the use and possession of the home. There was no evidence of any unusual impediment to Mr. Hepworth obtaining a Certificate of Possession. Rather, the evidence showed that it was essentially his for the asking. Mr. Johnson, who for over thirty years has been a Band Councillor and Chairman of Housing, testified that the appellant had only to apply and pay the survey cost in order to obtain a Certificate of Possession."[56]

[54] *Hepworth v Hepworth*, [2012] NSJ No 612, 2012 NSCA 117, 223 ACWS (3d) 669, 323 NSR (2d) 116, [2013] 1 CNLR 136, 29 RFL (7th) 221, 2012 CarswellNS 842 [*Hepworth*].
[55] *Ibid* at para 4.
[56] *Ibid* at para 32.

This was enough evidence for the Court to conclude that Mr. Hepworth was lawfully in possession of the matrimonial home absent a Certificate of Possession. The home was valued at $40,000[57] and so a compensation order of $20, 000 was issued for Ms. Hepworth.[58]

It is notable that in *Hepworth* the Court took into account the testimony of the Band Councillor who was also the Chairman of Housing in concluding that there was a legal possessory right to the matrimonial property on reserve.

Paul v. St. Mary's First Nation

Paul v. St. Mary's First Nation[59] is a 2020 case of the New Brunswick Court of Queen's Bench. The case is not related to a family dispute following a death or divorce, but instead relates to a dispute between a First Nation member and his council. We include it here because the dispute is related to Mr. Paul's claim to land rights based on his family's historical occupation of the site. The case is an example of a restrictive approach by the Courts to a claim of possessory rights despite a long and peaceful enjoyment of the land by a First Nation member and his ancestors.

The defendant in this case, the St. Mary's First Nation, has two reserves, one of which is used for ceremonial purposes. The plaintiff, Mr. Paul, a St. Mary's First Nation member, asserted that he had a possessory right to a portion of the ceremonial land, or that he should be compensated for the improvements made to the ceremonial land.

From 2004 onwards, Mr. Paul and other band members began using the ceremonial land for business related purposes.[60] In 2005, the St. Mary's First Nation band council gave notice that all structures had to be removed from the ceremonial land. Mr. Paul did not comply with the notice. Instead, he erected more structures on the land including a shed, limousine and a billboard.[61]

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[57] *Ibid* at paras 48-49.
[58] *Ibid* at para 50.
[59] *Paul v. St. Mary's First Nation*, [2020] NBJ No 241, 2020 NBQB 160, [2020] AN-B no 241 [*Paul*].
[60] *Ibid* at para 8.
[61] *Ibid* at para 9.

Mr. Paul asserted that he had possessory title to the ceremonial land pursuant to section 22 of the *Indian Act* based on his ancestors' peaceful possession of the property from 1847 to 2003. The assertion, however, was rejected by the Court.

The Court found that Mr. Paul had no lawful claim to the ceremonial lands either through historical occupation or through section 22 of the *Indian Act*.[62] The Court stated that transfers of possessory interests in reserve land that do not conform to *Indian Act* requirements are invalid.[63]

Mr. Paul relied on *Stoney Band v. Poucette,*[64] to advance his claim that he had possessory title to the ceremonial lands. The Court rejected this argument because in the *Stoney Band* case the family resided and made permanent improvements to the land *before* it became a part of the reserve. In Mr. Paul's circumstance, he did not.[65] Mr. Paul was not in possession of the ceremonial lands when it became a reserve.[66]

Mr. Paul asserted that he was entitled to receive compensation for improvements made to the ceremonial lands and that he should be compensated for lost income from his commercial signage.[67] Mr. Paul relied on section 23 of the *Indian Act.*[68] The Court rejected this claim as well, and said that sections 22 and 23 of the *Indian Act* were to be read together.

Sections 22 and 23 of the *Indian Act* read:

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[62] *Supra*, note 59 at para 56.
[63] *Ibid* at para 52 citing *Toney v Toney Estate,* 2018 NSSC 179 (CanLII), *Bordeau Santoro (Estate of) v Bordeau*, [2011] 3 CNLR 98, Neutral Citation: 2011 QCCS 1736 and *Paul v. Cooper,* 2009 BCSC 515).
[64] *Stoney Band v. Poucette*, 1996 CanLII 10580 (AB QB) [*Stoney*].
[65] *Supra*, note 59 at para 54.
[66] *Supra*, note 59 at para 54.
[67] *Supra*, note 59 at para 57.
[68] *Indian Act*, RSC 1985, c I-5, at s. 23.

> "22. Improvements on lands: Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included."
>
> "23. Compensation for improvements: An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister."

Since Mr. Paul did not have lawful possession of the ceremonial lands, the Court found there was no way he could claim compensation. It also noted that the Council's approval of Mr. Paul's structure on the ceremonial land in 2004 was later revoked in 2005. Mr. Paul did not comply with the Council's revocation and he kept his structures on the land. The Court found that the structures on the land did not constitute a permanent improvement and, if there were any grounds for compensation, that discretion lay with the Minister.[69]

The *Paul* case is an example of a restrictive approach to determining possessory ownership of reserve land under the *Indian Act* prior to *FHRMIRA*. Under *FHRMIRA,* this type of approach to understanding possession in property could change, but without Council approval, it is uncertain whether a similar type of possessory claim would be considered a custom allotment. Still, it is useful to review the way the court in *Paul* discussed what type of possession *could* be viewed as defensible. Aspects of this reasoning may find its way into future caselaw under *FHRMIRA,* given that the Courts will be looking for modalities and ways of thinking about what is valid possession and what does it mean to say an interest or right has been "recognized" by a First Nation.

[69] *Supra*, note 59 at para 62.

Review of caselaw on possessory claims

To summarize, although there is no caselaw directly dealing with what constitutes a valid custom allotment under *FHRMIRA*, discussions by the Courts of what constitutes "lawful possession" under the *Indian Act* or Land Code framework can still provide insight. As such, when determining if a First Nation member is in lawful possession of a home on reserve absent any grant recognized by the *Indian Act* or a Land Code, the Courts have considered the following factors persuasive:

- Loans given by Indigenous Services Canada and the First Nation council to renovate the home;
- The First Nation council providing support and approval for the building and occupancy of the home, such as by:
    - providing the land for the home by Council resolution,
    - providing workers to build the home,
    - hooking up the house to necessary infrastructure and providing services to the home, such as water and electricity,
    - granting construction subsidies,
    - reimbursing the First Nation members for costs associated with renovations and repairs, and
    - testimony by a band councillor or housing administrator that the band member is in proper possession of the home.

This is not an exhaustive list of factors, rather it points to the direction that Courts have looked to determine lawful possession of a home on a First Nations reserve. It is also important to note that how Courts interpret lawful possession of a home may, at times, be very different than how a First Nation exercises their Indigenous laws in recognizing rights or interests in structures in their territory. The following section will highlight, in brief, how Courts have recently grappled with the force and place of Indigenous laws within Federal legal regimes.

Recent Court Decisions Interpretating Indigenous Laws

It is unclear whether a First Nation or Court will take the same factors mentioned above into account when determining if an individual has a valid interest or right in a structure on reserve pursuant to a custom allotment under a *FHRMIRA* application. These factors were discussed and accepted by Courts using an aboriginal law interpretation of an interest or right in a matrimonial home, but not necessarily an Indigenous law interpretation.

It is important to reiterate that aboriginal law and Indigenous law are distinct from one another. Aboriginal law is the common or civil law interpretation of aboriginal law issues while Indigenous law refers to the laws that are practised specifically by an Indigenous population following their own legal traditions. When a Court is considering an Indigenous law issue, it is important to recognize that Indigenous laws differ from Nation to Nation and place to place. Indigenous law is not homogenous, and this is an important factor to consider in the context of interpreting a custom allotment under *FHRMIRA*.

Although in many cases Indigenous Nations exercise their own laws completely separately from the common and civil legal structures, from time to time disputes stemming from a Nation's exercise of its own Indigenous laws have found their way to Canadian Courts. A brief review of some of these recent cases can provide insight on the direction Courts are headed in its interpretation in regard to Indigenous laws.

Whalen v. Fort McMurray

In *Whalen v. Fort McMurray*[70], the Federal Court dealt with a First Nation's *Elections Regulations.* The Court stated that it will "recognize the existence of a rule of Indigenous law when it is shown to reflect the broad consensus of the membership of the First Nation."[71]

[70] *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 (CanLII), [2019] 4 FCR 217
[71] *Ibid* at para 32.

Alexander v Roseau River Anishinabe First Nation

Similarly, the Federal Court in *Alexander v Roseau River Anishinabe First Nation*[72] wrote that:

> "The significance and importance of indigenous laws lies in the broad community support for the laws, which are typically drafted with the guidance of respected knowledge keepers, as well as support and adherence to the bodies and the process established by such laws. Indigenous laws may also encompass indigenous peoples' relationship with one another as well as with the world around them."[73]

Pastion v Dene Tha' First Nation

In *Pastion v Dene Tha' First Nation*[74], the Federal Court established that the First Nation's custom election process was a form of self-government and the Election Appeal Board was an Indigenous decision-making body, to which the Courts should give deference.[75]

Beaver v. Hill

In *Beaver v. Hill,* the Ontario Court of Appeal recognized that separate spheres of jurisdiction is a form of reconciliation.[76]

Coastal GasLink Pipeline Ltd. V. Huson

In what could be considered a step back in judicial reconciliation, the British Columbia Supreme Court recently found in *Coastal GasLink Pipeline Ltd. V. Huson* that Indigenous law is only enforceable Canadian law if it is accepted as such by another level of government. It wrote:

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[72] *Alexander v Roseau River Anishinabe First Nation*, [2019] FCJ No 168, 2019 FC 124.
[73] *Ibid* at para 18.
[74] *Pastion v Dene Tha' First Nation*, [2018] 4 FCR 467, 2018 FC 648, [2018] 4 RCF 467, [2018] FCJ No 664, [2018] ACF no 664, [2019] 1 CNLR 343, 2018 CarswellNat 3238.
[75] *Ibid* at paras 23 and 14.
[76] *Beaver v Hill*, [2019] 2 CNLR 1, Neutral Citation: 2018 ONCA 816 at para 63.

> "As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions*: Alderville First Nation v. Canada*, 2014 FC 747 at para. 40"[77]

As the Wet'suwet'en have not settled their aboriginal title claims through litigation or negotiation and although Wet'suwet'en laws exist in their own legal footing, the Court found Wet'suwet'en can not be recognized as being an effectual part of Canadian law.[78] All the Court was willing to recognize was that Indigenous laws may be admissible as fact evidence of the Indigenous legal perspective, where there is evidence of Indigenous customary laws.[79]

Summary of caselaw addressing Indigenous Laws

Through these limited recent examples of Canadian Courts confronting the enforceability of Indigenous peoples' exercise of their inherent right to self-govern, certain principles are emerging which could be useful for providing direction on how custom allotments within a First Nation reserve or territory could be better understood:

- If an Indigenous law has broad community consensus of the First Nation membership, the Court is more likely to accept it;
- The significance and importance of an Indigenous law lies in the community support for that law;
- Modern expressions of Indigenous law should be drafted by respected knowledge keepers, with support and adherence to the process established by or for such laws;

[77] *Coastal GasLink Pipeline Ltd v Huson*, [2019] BCJ No 2532, 2019 BCSC 2264, at 127 [*Coastal Gaslink*].
[78] *Ibid.*
[79] *Ibid* at para 129.

- Indigenous laws may encompass the relationship between people in the Nation as well as the world around them;
- The recognition by the Courts and other levels of government of the separate spheres of jurisdiction of Canada's Indigenous Nations is a form of reconciliation; and
- Indigenous customary laws may only become a part of Canadian common law or domestic law through treaties, court declarations, aboriginal rights or title jurisprudence or statutory provisions. This last point goes against the legal principle that Indigenous Nations have inherent rights to self-govern. It also contravenes many statements by the federal government as well as the *United Nations Declaration on the Rights of Indigenous Peoples* and Canada's Bill C-15 to adopt the *United Nations Declaration on the Rights of Indigenous Peoples Act* recognizing the inherency of the right to self govern.

This is not meant as to be a comprehensive list of principles recently established through caselaw, but rather a synopsis of the direction that Courts are heading in their approach to understanding Indigenous laws. These principles provide a starting point to further developing a framework for how to interpret and understand custom allotments under *FHRMIRA*.

Concerns Raised by Some First Nation Members if Custom Allotment Practices Aren't Communally Accepted or Transparent

Unfortunately, the ways that custom allotments are granted are not universally fair and accepted by community members. The few reports and papers that discuss the prevalence and practice of custom allotments raised concerns that sometimes land and homes are handed out or taken away by Council with little understanding and/or acceptance by community members. For example, the Interim Report of the Senate Committee on Human Rights, mentioned above, noted concerns of some of the witnesses before the Committee, specifically when customary allotments are granted without clearly understood principles which underlie the grants and with little transparency or community support:

> "If a chief and council want your custom land allotment, he has merely to pass a band council resolution to give it to themselves. If the chief wants your custom land, he just has to describe your land and pass a band council resolution, register it with the minister and the minister will recognize his title. There are many native people who are fighting their own chief and council who have taken away their custom land allotments. Because the chief and council is a delegated government they know that your custom land allotment is worth nothing in court. If it is worth nothing in court, it is not worth anything anywhere."[80]

A report was completed in 2005 by the Standing Committee on Aboriginal Affairs and Northern Development entitled "*Walking Arm and Arm Resolving the Issue of Matrimonial Real Property On-Reserve."*[81] As the title suggests, this report looked at ways to address and reform the inequities regarding rights and possession of matrimonial real property on reserve, particularly in the context of separation or death. These discussions, through this report and elsewhere, eventually led to *FHRMIRA.* Unfortunately, the Committee heard little evidence relating to First Nations that use custom systems of land allotment.[82] The few witnesses who did speak of custom allotment, however, expressed that, in some communities, even First Nations members themselves may not know the rules followed in custom allotments. There was a fear that this results in abuses.[83] The Interim Report highlighted the necessity for internal transparency in custom land allotments. It also suggested that First Nations that allot land through custom enter these allotments in some sort of registry.[84]

Because of the scarcity of houses and available lots of land in Canada's First Nation reserves, which are but a fraction of a Nation's traditional territory, custom allotments can be a highly political and contentious issue. This is reflected in the legal issues that end up in Canadian Courts, such as those discussed above. The political nature of these decisions can be particularly heightened in First Nations

[80] *Supra*, note 14 at. 25-26.
[81] *Supra*, note 14.
[82] *Supra*, note 14 at. 2.
[83] *Supra*, note 14 at 41.
[84] *Supra*, note 14 at 42.

where the decision whether or not to allot land is made (and can be reversed) solely by the elected Council, with no widely understood set of principles and processes to frame these decisions.

It is important to take these types of challenges into consideration and address them in a way that respects the revitalization of First Nation land management laws and legal orders. It is also important to ensure that community members who are negatively impacted by injustices that occur have legal recourse to have their concerns heard. There must be a balance between respecting Indigenous laws, creating space for those laws to receive the legitimacy that they deserve by common and civil law legal traditions, while simultaneously creating internal safeguards to prevent abuses of power, should they arise.

It is also important to recognize that these inequitable circumstances are, in large part, a result of centuries of colonialist policy, leaving First Nations struggling with inter-generational social inequity prolonged by Canadian laws. As stated by Indigenous law scholars, Val Napolean and Emily Snyder:

> "… internalized conflict experienced in the local community may be viewed as a microcosm of the larger combined forces of colonialism, hetero-patriarchy, neoliberalism, capitalism, Indigenous self-determination measures and continual resistance."[85]

Viewed from this perspective, it is questionable whether the granting of custom allotments in the absence of transparency, accountability, broad community support or consensus is actually an expression of a Nation's Indigenous laws, as it is in many communities. Instead, it may be a stark demonstration of what can go wrong when the dominant and imposed legal regime is ignored because of its patent insufficiency, but without a strong internal legal order still in place. After centuries of the Federal government actively trying to undermine and erase Indigenous legal orders and land management systems, the strength of these internal systems have, in many cases, eroded. Without either the *Indian Act* regime or their own systems in place, there is an unacceptable opportunity for nepotism or other unfair practices.

[85] *Supra*, note 17 at 81.

The hope is that by talking about the potential concerns and problems that can arise, we encourage useful dialogue on how communities can strengthen their internal governance structures and revitalize their own Indigenous ways of managing their lands. But it is up to each First Nation on when and how they would like to have these conversations, rather than a paternalistic, top down approach. It has to be led by the Nation itself.

Recommendations of Factors for Courts to Consider when reviewing Custom Allotments under a *FHRMIRA* Application

There are decades of aboriginal law jurisprudence grappling with questions around possession of family homes and land on reserve outside the *Indian Act* requirements, as well as limited caselaw on custom allotments (unrelated to an application under *FHRMIRA*). Through this jurisprudence, we see factors emerge about when and how a person can be considered in lawful possession of land or a home in the absence of a Certificate of Possession. Looking ahead, Courts will surely rely, at least in part, on these cases when reviewing a *FHRIMIRA* application that concerns a custom allotment.

When a judge receives an application under *FHRMIRA,* such as an application to divide the value of the family home/land on reserve, or an order for exclusive occupation, and when that application deals with buildings or structures that were granted following a customary allotment system, the judge has an obligation to treat the applicants, the First Nation and all other interested parties with respect, fairness and common sense. A judge should not blindly recognize a custom allotment if, in fact, some other party has a more valid claim. This is not fair or just.

Some hypothetical scenarios of invalid claims of a custom allotment could be: Mr. W. claims he has a valid ownership interest or right in his home on reserve, but his cousin Ms. X has clear evidence that she is the rightful interest-holder, and Mr. X was only using the home while she was away studying. Or another example: Ms. Y. says she was granted a piece of land and home by the Chief, but further evidence shows

the Council had already granted the lot to someone else prior. And yet a final example: Mr. Z. claims to own a piece of land and the home he built on it, but further evidence reveals that he built the home against the express wishes of the Council and neither his neighbours nor the community at large recognize his interest in the land.

All that to say, the recognition of custom allotments cannot give free rein to anyone claiming interest, without hearing relevant evidence from the First Nation and its membership about the circumstances and validity of the allotment as it would not advance our stated purposes of recognizing custom allotments in *FHRMIRA,* namely*:*

> 1) To increase fairness to family members whose rights in the homes are grounded in a custom allotment, and
> 2) To increase the recognition in Canada of the inherent validity and enforceability of Indigenous laws and legal orders in the context of custom allotments.

Without thoroughly reviewing the evidence before them from the First Nation and its membership, the Courts could open the door to injustice instead of protecting good-faith First Nation members.

Taking all of this into consideration, the following are some of the factors that Courts should contemplate when determining the validity of a custom allotment:

- Did the family/individual fairly and in good faith believe they were owners or had rights in the home/land?
- Did neighbours and other community member see that family/individual as the owners or having rights in the home/land?
- Did the First Nation council provide any type of support or approval for the building and occupancy of the home/land, such as by:
    - providing the land for the home by, for example, Council resolution,
    - providing workers to build the home,

  - hooking up the house to necessary infrastructure and providing services to the home, such as water and electricity,
  - granting construction subsidies,
  - reimbursing the First Nation members for costs associated with renovations and repairs.
- Was there testimony by, for example, a councillor or housing administrator that the family/individual was in proper possession of the home?
- Was the allotment recorded or registered anywhere? (i.e. a local registry, a council resolution, stated in the council meeting minutes, a letter?)
- Were loans provided by Indigenous Services Canada and the First Nation council to build or renovate the home?
- Does anyone else has a competing claim to the land/home? If so, what are the circumstances.
- Did the granting of the custom allotment breach anyone else's fundamental right to procedural fairness?
- Did the granting of the land/house follow a commonly understood and accepted process? In other words, did the process follow a local process/legal regime that had broad community consensus of the First Nation membership?
- Is there a written process or law for allotting land and/or homes in the First Nation? How was it approved? Does it have broad community support?
- Was the process created (whether written or not) by or in consultation with respected knowledge keepers, with support and adherence to the process established by or for such laws?

Considerations on Increasing Transparency and Acceptability of Custom Allotment Regimes to Facilitate their Recognition under *FHRMIRA*

As discussed above, the Interim Report published by the Senate Committee on Human Rights raised concerns of certain witnesses that came before the Committee. Without court recognition and a transparent system of custom allotments, the Interim Report feared that community members suffer negative consequences: "[…] your custom land allotment is worth nothing in court. If it is worth nothing

in court, it is not worth anything anywhere."[86] This is a very harsh statement, and at least under *FHRMIRA* it is not quite as true as it once was. Still, this statement highlights that in order to protect families and community members, customary land management needs to be:

1. Given legal recognition and deference by Courts, and
2. Transparent to and accepted by community members.

As in any legal order and government process, there are inevitable contentions and challenges that arise. As discussed in this report, there are concerns around the potential for abuses in how custom allotments are managed in communities when there isn't a clearly understood process or acceptance about how these allotments are done, as well as what the custom grant means.

In consideration of these challenges, the authors have developed suggestions for First Nation governments that are interested in increasing transparency and internal acceptance of their custom allotment processes:

- Ensure the process of how decisions over lands/homes are made are transparent and clearly understood by First Nation community members;
- Create a custom allotment land registry system where custom allotments are recorded by the First Nation and accessible by community members;
- Create an equitable process to safeguard against potential abuses of power and to reflect people's fundamental right to procedural fairness, such as by:
    - Ensuring individuals with a personal interest in a housing/lands decision are not part of the decision, and
    - Giving people a fair chance to be heard before decisions are made.
- Include the views of respected knowledge keepers within the Nation when clarifying or creating the process (such as by writing out the process in a written law); and

[86] *Supra*, note 14 at 25-26.

- Ensure community members approve of the process (through whatever mechanism makes sense for that Nation).

It is important to recognize once again that the manner that each First Nation grants custom allotments does and will continue to differ from one another. The hope is that the suggestions above are general enough to be helpful for many First Nations who wish to consider ways to strengthen their custom allotment process by focusing on certain principles, such as transparency, acceptance, fairness, accountability and predictability.

Having a transparent and accountable system will also make it easier for community members, in the context of a *FHRMIRA* application, to provide evidence of and explanations of why and how they have interests in their home/land.

Conclusion

Even after centuries of the *Indian Act* being imposed on Canada's First Nations, an extremely high number of First Nations operate completely outside of its reigns when it comes to land management. This is just one example of how the *Indian Act* has failed. The *Indian Act* has been a disaster in a myriad of ways, but in trying to create a uniform, fair and usable system of land management, it has failed most spectacularly.

Recognizing the validity of custom allotments in *FHRMIRA* is a positive step towards reconciliation and decolonization, even if it is not sufficient or perfect (being that it only extends to buildings and not lands). But it starts us down a path that recognizes that there is an incredible diversity of Indigenous legal orders. Canada tried to impose uniformity through the *Indian Act,* but it did not work, and it will never work. The only solution to the mess created by colonization is finding ways to live with the legal pluralism that is Canada. Our cultural and legal diversity is a beautiful thing and, if properly recognized, can be a positive development for Canada as a whole. More importantly, it can open the doors wider for First Nation

communities to thrive and to provide security to families who need to know their rights in their homes and lands will be respected.

This report also emphasized that there are principles of fairness and good governance that First Nations members want to see in their local governments. If custom allotments are managed without perceived fairness or transparency, this is not a situation that is desirable for most First Nation members. Hopefully this paper offered some insights into how accountability and transparency can be improved in a way that is respectful of the strength and diversity of the many legal orders of Canada's Indigenous Nations.

At least in the context of a FHRMIRA application, now when Courts deal with custom allotments they no longer have to belabour the question of whether or not Ministerial approval was given and whether the right was registered as required by the *Indian Act* Courts can now move their focus to what matters in these types of applications: Did the person reasonably believe that they hold rights to the family property? Did others also see them as having rights? What about the Council or governmental body? What were the rights? This will allow the courts to make determinations that are fair and relevant to *that* family and *that* First Nation when it comes to who should live in a home or for how long, and how the value of that home should be divided between spouses.