REPORT OF THE MINISTERIAL REPRESENTATIVE MATRIMONIAL REAL PROPERTY ISSUES ON RESERVES

Submitted by
WENDY GRANT-JOHN

March 9, 2007

The Honourable James Prentice, P.C., M.P.
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10 Wellington Street
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Dear Minister Prentice:

It is my pleasure to submit my report on the recently concluded consultation and dialogue process concerning matrimonial real property issues on reserves. Since June 20th of last year, it has been an honour to engage in discussions with First Nation representatives and community members on this very important subject.

Many substantive discussions were held that have shed further light on the legal complexities and real life consequences for spouses of the current legislative gap respecting matrimonial real property protections on reserves. The larger legal context of aboriginal and treaty rights issues, human rights, land regime and administration of justice issues was explored during this process. Situating matrimonial real property issues within the legal, social and cultural context in which they are experienced by First Nation families including the particular experience of First Nation women is an important reference point for the recommendations I have made. Just as importantly, many of the implications arising from *Haida* case law respecting consultation are better understood I believe, as a result of the exchange of views that took place during this process.

While a consensus was not possible to achieve on the most viable legislative and non-legislative responses, I feel a bridge has been built for increased understanding and reconciliation on this and other issues of great concern to First Nations people. The opportunity is there. I wish you well in your endeavours to develop this initiative further.

Sincerely,

Wendy Grant-John

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Executive Summary

REPORT OF THE MINISTERIAL REPRESENTATIVE MATRIMONIAL REAL PROPERTY ISSUES ON RESERVES

March 9, 2007

This report by Wendy Grant-John, Ministerial Representative on matrimonial real property issues on reserves to the Minister of Indian Affairs describes the results of a three-phase consultation process which ended in February 2007. The primary objective of this process was to provide a recommendation to the Minister regarding a viable legislative option to address matrimonial real property issues on reserves. The process was to comply with the *Haida* case law principles concerning consultation.

The Ministerial Representative's mandate was to act as a neutral party, to assist Indian and Northern Affairs Canada (INAC), the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) in exploring options to address matrimonial real property issues on reserves. In accordance with her mandate to provide a recommendation if the parties did not reach consensus, the Ministerial Representative makes recommendations informed by the discussions held.

The historical and contemporary context for matrimonial real property issues on reserves is provided. An overview is provided of the dynamics of past *Indian Act* amendment processes and lessons that can be learned from this experience. The report explains the sense of urgency to act on the issue of matrimonial real property evidenced by several Parliamentary Committee reports and eight United Nations human rights reports.

Fourteen key themes arising in discussions throughout the process are identified.

General conclusions are offered. It is noted that some First Nation people expressed doubt about the need to act on matrimonial real property at this time, and particularly through federal legislation. There was a broad recognition of the issue as an important one affecting the welfare of many First Nation men, women and children. First Nation people fully expect recognition of First Nation lawmaking power in relation to matrimonial property. Some First Nation people also see the utility of interim federal rules to provide some immediate interim protection for crisis situations.

In addition to a substantive law respecting matrimonial real property that recognizes First Nation jurisdiction, the report says other pre-requisites for the enjoyment of matrimonial property rights such as access to the justice system and functioning land regimes reflective of the people they are intended to serve. The report identifies an urgent need for short-term measures to address dispute resolution needs as well as issues relating to the enforcement of court orders and First Nation laws.

Some aspects of provincial law do apply on reserves and there is much diversity among provinces and territories on some key policy issues such as the treatment of common law and same sex spouses. Harmonization issues are noted respecting the interplay of federal, provincial and First Nation laws on reserves.

Lawmaking power in relation to matrimonial real property is seen as an aspect of First Nations' inherent authority and treaty rights in relation to land and family relations. First Nation people expect the federal Crown to fully respect its fiduciary duties in respect to First Nation land, treaty and aboriginal rights. Further, they expect the Crown to fully discharge duties of consultation arising from such rights. The report describes several consultation issues, including whether there is a duty to consult, that arose throughout the process. Recommendations are made to respond to these concerns including the need

for a federal consultation policy to respond to the *Haida* decision and a number of other operational and procedural measures.

Rates of marital breakdown for both married and common law couples on reserves are comparable to the off-reserve population. The impacts of the lack of matrimonial real property protections have been greater for First Nation women overall than for First Nation men due to current social roles and ongoing impacts from past discriminatory provisions of the *Indian Act* that excluded First Nations women from governance and property. The issue of domestic violence is linked to matrimonial real property issues.

Protecting the interests of children is a central concern. For most First Nation people, this requires putting the interests of children ahead of spouses and protecting the collective First Nation interests in reserve lands. Beyond this universal position, there are a range of values, laws and practices among First Nations concerning the role of individual interests in reserve lands. Some discussion of court decisions respecting the collective interest First Nations hold in their reserve lands is provided.

The uniqueness and diversity of interests in land and housing arrangements on reserves is explained in some detail, both in regard to collective rights and individual interests.

In addition to the limited application of provincial laws of general application, there are other factors contributing to the current lack of protection respecting matrimonial real property on reserves: there is no federal legislation addressing this matter and First Nations jurisdiction respecting matrimonial real property is not recognized by the federal government.

The relevant standard in federal analysis of how to respond to the legislative gap has been what the law provides off reserves, while for First Nations the relevant standard is recognition of the validity of First Nation values and traditions in relation to land and family. There is a question whether all of the typical provincial-type remedies are suitable for the particular land regime of *Indian Act* reserve communities and whether some new approaches and remedies might work better.

In the discussions held, there was a very strong preference for recognition of First Nations' jurisdiction to fill the legislative gap identified, a minimal role for federal legislation and a virtual universal opposition to the introduction of provincial laws (by incorporating them in a federal law) to deal with this issue.

It became clear very early in the process that federal options 1 and 2 listed in the INAC consultation documents were considered not acceptable to First Nation people. These options involving the full incorporation by reference of provincial laws of general application were considered to constitute infringements of aboriginal and treaty rights that are not justifiable. They were also regarded as posing too many practical problems in terms of harmonization and conflict of laws. A third option proposed by the federal government would involve some form of recognition of First Nations' jurisdiction by the federal Parliament. However, it was not clear during the consultation process whether federal Option 3 was open to a recognition of inherent or pre-existing lawmaking powers rather than delegated powers. The message from First Nation people was equally clear on this point. Delegated powers would not be acceptable and First Nations are looking for a clear recognition of First Nations' jurisdiction. The conclusion is drawn that a modified Option 3 or an alternative to it, are the only viable possibilities for a number of reasons. Participants in both AFN and NWAC discussions said that First Nation people want to see matrimonial property law that incorporates First Nations views of land and family.

The Ministerial Representative's key recommendation respecting a legislative option is a concurrent jurisdiction model in which First Nation jurisdiction over matrimonial real property including dispute resolution would be immediately recognized and take paramountcy over any conflicts with federal or provincial law. In addition, until such jurisdiction was exercised by First Nation, interim federal rules would provide some protections such as: prohibition against sale or transfer of interest in the matrimonial home without spousal consent, exclusion orders, interim orders of exclusive possession, compensation orders for the value of the home alone as an improvement, *Derrickson*-type compensation orders, orders for new remedies upon evidence of First Nation practice and legal traditions. A large number of non-legislative options proposed during the process are noted.

Issues vital to achieving a comprehensive matrimonial property regime but which cannot be addressed through a sectoral initiative alone are identified – issues relating to land management, land registries, wills and estates, administration of justice, self-government, First Nation citizenship, support and custody issues. The viability and effectiveness of any legislative framework will also depend on necessary financial resources being made available for implementation of non-legislative measures such as programs to address land registry issues, mediation and other court related programs, local dispute resolution mechanisms, prevention of family violence programs, a spousal loan compensation fund and increased funding to support First Nation communities to manage their own lands. Without these kinds of supports from the federal government, matrimonial real property protections will simply not be accessible to the vast majority of First Nation people.

The Ministerial Representative makes recommendations for steps towards the larger reconciliation purpose of s. 35 of the *Constitution Act, 1982*. A broad policy framework to manage the process of change is recommended by the Ministerial Representative, one that is premised on two fundamental principles:

1) Federal policies and legislative initiatives are to be based on a recognition of First Nation jurisdiction and respect for aboriginal and treaty rights;
2) Both federal and First Nation governments have obligations to respect and implement internationally recognized human rights values.

Recommendations are made respecting steps to work with First Nation organizations following submission of this report, and assessment of any legislative proposal that may emerge from government decision-making.

I. Introduction

1 On June 20, 2006, as Minister of Indian Affairs and Northern Development, you announced the launch of a three-phase process to examine matrimonial real property issues on reserves. The three phases consisted of a planning phase that began in June 2006; a consultation phase launched in September 2006; and a consensus-seeking phase that began in February 2007. The objective of this process was development of a recommendation to you as Minister on the content of matrimonial real property legislation by the end of March 2007.

2 My appointment as Ministerial Representative was also announced on June 20, 2006. My role was to act as a neutral party charged with assisting and advising three parties - Indian and Northern Affairs Canada (INAC), the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) – in exploring options to address matrimonial real property issues on reserves. This included a mandate to facilitate and mediate discussions between the three parties and to make a final report to you on the outcomes of the consultation and consensus-seeking processes. The ultimate goal of the three-phased process was to explore the potential for jointly developing legislative and non-legislative options to address matrimonial real property issues on reserves. Another objective of the process was to ensure compliance with the *Haida* decision. In the event the three parties were unable to reach a consensus, I was asked to make a recommendation for a viable legislative response to matrimonial real property. A description of my mandate is provided in Appendix A. The submission of this report marks the completion of my mandate as Ministerial Representative. As the parties were unable to reach consensus, the heart of this report reflects what I heard throughout the three phases of the matrimonial real property process and supports the recommendations I am making in Chapter 7.

3 The process involved parallel and joint activities by Indian and Northern Affairs Canada, the Assembly of First Nations and the Native Women's Association of Canada to engage First Nation people in discussion on what is needed to address matrimonial real property issues on reserves. In addition to my report, there are reports from each of the participating organizations referred to above on their activities and viewpoints (see Appendix B).

4 During the consultation and dialogue sessions, many First Nation people asked what led the government to initiate this process. Many also asked how it came to be that the issue of matrimonial real property had been assigned such a priority as a potential area of legislative activity given the many other unresolved policy and legal issues affecting the well-being of First Nation people across the country. These are important questions and my report offers a history of events (in Appendix C) ultimately leading to launch of this process. This overview will explain the sense of urgency now felt by many to act on the issue of matrimonial real property while also recognizing First Nations' jurisdiction in a manner consistent with section 35 of the *Constitution Act, 1982*. The more recent history includes several Parliamentary Committee reports[1] and eight United Nations human rights reports calling for action on the subject of matrimonial real property.[2]

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1 See for example, Canada, Senate Standing Committee on Human Rights, *A Hard Bed to lie in: Matrimonial Real Property on-reserve, Interim Report of the Senate Standing Committee on Human Rights*, 37th Parliament, 2nd Session, November 4, 2003; Canada, Senate Standing Committee on Human Rights, *On-reserve Matrimonial Real Property: Still Waiting*, 4th Report, 38th Parliament, 1st Session, December 14, 2004; Canada, House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property*, 5th Report, 38th Parliament, 1st Session, June 8, 2005; Canada, House of Commons, Standing Committee on the Status of Women, 7th Report, 39th Parliament, 1st Session, June 2006.

2 United Nations, Committee for the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, UN doc. A/57/18,11 November 2002, para 332; United Nations, Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Canada, UN doc. E/C.12/1/Add.31, 4 December 1998, paras 29 & 47; United Nations, Committee on the Elimination of Discrimination Against Women, Consideration of Reports of State Parties: Canada, UN doc. CEDAW/C/2003/1/CRP.3/Add.5/Rev.1, 31 January 2003, para 37; United Nations, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Advance Edited Version, UN doc. E/CN.4/2005/88/Add.3, 2 December 2004 at para 112; United Nations, Concluding Observations of the Human Rights Committee: Canada 02/11/2005, UN doc.

5 It should also be noted that United Nations human rights bodies have expressed concern regarding Canada's human rights compliance affecting Aboriginal peoples in areas in addition to matrimonial real property. Several of these reports call for action on the implementation of the recommendations of the Royal Commission on Aboriginal Peoples particularly those calling for new legislation on Aboriginal rights.[3] The most recent expressions of concern were made by the UN Committee on the Elimination of Racial Discrimination (CERD Committee). These concerns include references to matrimonial real property, matters relating to access to justice for Aboriginal peoples, Indian status and band membership, violence against Aboriginal women, failure to implement the recommendations of the Royal Commission on Aboriginal Peoples, litigation and negotiation of Aboriginal land rights including the need for negotiations based on recognition and reconciliation. The CERD Committee welcomed the proposed repeal of s. 67 of the *Canadian Human Rights Act* but noted that its repeal in itself does not guarantee enjoyment of the right to access to effective remedies by on-reserve Aboriginal individuals. The Committee recommended that Canada support the immediate adoption of the United Nations Declaration on the Rights of Indigenous Peoples and ratify the ILO Indigenous and Tribal Peoples Convention No. 169.[4]

6 Several aspects of the history and context that underlie matrimonial real property issues require explanation – the role and function of the *Indian Act* land regime, the complexities of *Indian Act* amendment initiatives, the history of federal policy and legislation negatively impacting First Nation women and federal policy in relation to recognition of First Nation rights protected by section 35 of the *Constitution Act, 1982*. Another important consideration is that the rights of First Nations pursuant to section 35 are recognized and affirmed but remain to be fully implemented by a reassertion of First Nations' jurisdiction in areas such as matrimonial real property. An understanding of all of these areas is a pre-requisite to developing a viable legislative solution on matrimonial real property issues on reserves.

7 While some First Nation people expressed doubt about the need to act on matrimonial real property issues at this time, and particularly through federal legislation, there was a broad recognition of the issue as an important one affecting the welfare of many First Nation men, women and children. In this regard, First Nation participants in this process fully expect recognition of First Nation lawmaking power in relation to matrimonial property. Some First Nation people also see the utility of interim federal rules to provide some immediate interim protection for crisis situations.

8 It should be noted however that the views expressed by participants in the AFN sessions can not be construed as more than individual viewpoints expressed for purposes of dialogue, as participants in the AFN sessions did not have mandates to bind their First Nations for the reasons expressed in the report of the Assembly of First Nations:

"Without exception, all participants viewed these sessions as structured for information purposes only and not as consultation forums with the Government of Canada or Department of Indian Affairs. The participants were clear to express their hesitation and concern with the government's practice of construing any dialogue with First Nations' people as 'consultation' for the purpose of moving forward with its stated legislative agenda. In addition, for the First Nation leadership in attendance, they took

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CCPR/C/CAN/CO/5, at paragraph 22; United Nations Human Settlement Programme, "Indigenous Peoples' Right to Adequate Housing: A Global Overview, United Nations Housing Rights Programme Report No. 7, Nairobi, 2005 at p. 24, 29, 88-90; United Nations, Concluding Observations of Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/CAN/CO/5/CRP.1, 1-19 May 2006, at subparagraph 11 d), 17 & 45; United Nations, Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties under Article 9 of the Convention, UN doc. CERD/C/CAN/CO/18, Advance Unedited Version, March 2007, at para 15.

3 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, UN doc. E/CN.4/2005/88/Add.3, para 97; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada. 01/11/2002, UN doc. A/57/18, paras 329; Committee On Economic, Social And Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights (Canada), UN doc. E/C.12/1/Add.31, 4 December 1998, para 8.

4 United Nations, Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties under Article 9 of the Convention, UN doc. CERD/C/CAN/CO/18, Advance Unedited Version, March 2007.

the position that any decision regarding legislative or non-legislative options would require the input of their communities and they could not bind their communities without further discussion with them."

9 Lawmaking power in relation to matrimonial real property is seen as an aspect of First Nations' inherent authority and treaty rights in relation to land and family relations. First Nation people expect the federal Crown to fully respect its fiduciary duties in respect to First Nation land, treaty and aboriginal rights. Further, they expect the Crown to fully discharge duties of consultation arising from such rights. Issues concerning the Crown's duty to consult are of course intimately tied up with the Crown's authority to legislate and its duties to protect aboriginal and treaty rights.

10 Matrimonial property law is intended to provide guidance in resolving conflicts between spouses concerning the disposition of property. Matrimonial real property issues affect the interests of men, women and children. Accordingly, First Nation citizens are concerned that any legislative and non-legislative responses should promote social cohesiveness while also providing fair and equitable treatment of spouses. First Nation people do not wish to see federal legislation that again divides community members. They feel that this would occur if the federal government acts in a way that would reinforce old stereotypes e.g. that all First Nation governments are antagonistic to the protection of individual human rights or that matrimonial property is a "women's" issue. It is important to understand that when people say matrimonial property is not a women's issue they are not denying that there are particular impacts on First Nation women. Rather this means that it is an issue that affects the entire community and communities must determine solutions.

11 First Nations are moving to overcome the long exclusion of First Nation women from governance resulting from the various discriminatory impacts of the *Indian Act*. They are doing so by reclaiming their traditions that recognize the equal place of women in governance in various ways. Current rates of participation of First Nation women as Chiefs and councillors are at least comparable to those for Members of the House of Commons. As of November 2006, Indian Affairs[5] reported the following figures:

Female Chiefs: 109
Male Chiefs: 480
Total: Female and Male Chiefs: 589

Female Councillors: 751
Male Councillors: 1,839
Total: Female and Male Councillors: 2,590

The total number of women holding office as Chief or councillor is 860 based on the figures above, or 27.05% of the total number of Chiefs and Councillors which amounts to 3179. This rate is higher than that for women holding seats in the House of Commons, which is 64 of 306 or 20.91%.[6] It should be kept in mind that First Nation women were only granted the right to vote in band council elections in 1951. This may help to put into perspective the oft-repeated characterization of band councils and First Nation organizations as 'male-dominated'. There is still much work to do, but the issue of women's participation in leadership is one shared with the larger society, and the source of the problem in First Nations societies lies primarily in the imposition of the *Indian Act*, not First Nation cultural, legal or governance traditions.

12 It is clear from the discussions held that First Nations are determined to avoid any continuation of the history of imposed federal legislation, which even when not explicitly assimilative in intention, has too often brought unintended negative consequences. The experience with the 1985 amendments to the *Indian Act* respecting Indian status and band membership were cited as an example of this experience in practically every meeting on matrimonial real property.

[5] As reported by email from Lands and Trusts Services' Band Governance Directorate, November 2006.
[6] This information is available from the Parliamentary website at http://www.parl.gc.ca.

13 Matrimonial real property law can affect people's lives in a fundamental way. There are real concerns about rushing to meet what are seen by many as arbitrary timelines set by the government for drafting legislation, given the complexity of the subject-matter and the fact that harmonization and conflict of law issues between federal, provincial and First Nation governments will be numerous and complex. First Nation people fear unexpected negative outcomes with which they, not the drafters or legislators, will have to live.

14 In short, good intentions and good faith are not enough to ensure a good result. Quality drafting, based on the best information and careful consideration are required to meet the Crown's obligations in respect to the protection of human rights and the protection of aboriginal and treaty rights.

15 The *2001 Census* collected information on the Legal Marital Status and the Common Law Status of all respondents as of Census Day, May 16, 2001. It appears from this data that the rates of marital breakdown for both married and common law couples on reserves is comparable to the off-reserve population.

16 The off-reserve population in Canada has a marital breakdown percentage of 16.1%, which is almost two percent lower than the overall percentage on reserves. While a difference of 1.9% exists between the proportion of marital breakdowns off reserves and in the total Aboriginal population on reserves, the difference in proportions is similar between the total off-reserve population, and status Indians/members on reserves. Status Indians (i.e. registered Indians) and band members both have marital breakdown percentages of 18.1%, which is comparable to the total Aboriginal population on reserves. In each of these categories, the proportion of marital breakdown amongst the general Canadian population is two percent lower than the total Aboriginal population, the status Indian population, or the band member population.

17 The impacts of the lack of matrimonial real property protections are not necessarily the same for men and women. First Nation women are much more often the primary caregivers of minor children than First Nation men. This makes women and First Nation children particularly vulnerable to an absence of protections in regard to matrimonial real property. Figures from the 2001 Census reveal that the on-reserve Registered Indian population is still a much younger population than the off-reserve non-Aboriginal population. This means First Nation people overall are responsible for the upbringing of more children per family than non-Aboriginal people as a whole in Canada.[7] Census figures from 2001 show that a substantially higher proportion of Registered Indian women on reserves are engaged in unpaid household work involving looking after children compared to Registered Indian men on reserves.[8] Further the number of hours spent by Registered Indian women on reserves in this activity is substantially higher on average than Registered Indian men on reserves. The rates and hours for Registered Indian women on reserves for this type of responsibility are also substantially higher than those for non-Aboriginal women in Canada as a whole. A lack of matrimonial real property protections in relation to the family home can have particularly negative consequences because of the need and responsibility of primary caregivers to provide shelter and security for children.

18 In 1999, Statistics Canada estimated that 25% of Aboriginal women and 13% of Aboriginal men reported experiencing violence from a current or previous partner over the previous five years.[9] In some communities, rates can be as high as 80% or 90% for Aboriginal women. Thirty seven per cent of Aboriginal women and 30% of Aboriginal men reported emotional abuse during the previous five-year period.[10] These high rates of reportage mean not only that male and female spouses sometimes require legal assistance to exclude an abusive partner from the family home and to secure exclusive possession of the family home, but also there is a need for programs and support to prevent family violence and to deal with its consequences. The issue of domestic violence is linked to matrimonial real property issues because of the need of victims for security in their own homes. Several

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7 Jeremy Hull, *Aboriginal Women A Profile from the 2001 Census,* Indian and Northern Affairs Canada, February 2006 at p. 36.
8 *Ibid,* at 74-77.
9 *Aboriginal Domestic Violence in Canada,*(Ottawa: Aboriginal Healing Foundation, 2003) at pp. 36-37, at p 26.
10 *Ibid*.

provinces have enacted family violence legislation in addition to their matrimonial property laws to address the special needs of victims of domestic violence for protections and legal remedies. These measures include orders to regain access to the family home and its contents to the exclusion of the abusive family member.

19 The lack of protection First Nation women in particular experience in situations of marital breakdown and family violence is related to the history of gender-based discrimination under the *Indian Act*. The effects of the long history of discrimination under the *Indian Act* and other federal policies leading to the exclusion of First Nation women from leadership, landholding and citizenship are still being felt today. Continuing systemic inequalities must be taken into account in developing solutions for matrimonial real property issues on reserves. It must also be recognized that First Nation people wish to reclaim and use their traditional laws and values as well as international human rights principles as part of this struggle.

20 Some First Nation people question the assumption of a legislative gap because they believe the matter is being addressed through traditional or other First Nation laws and policies. Overall however, there was a general, albeit not universal, acknowledgement of the need for lawmaking by First Nation governments to address matrimonial real property issues on reserves. There was a very strong preference for recognition of First Nations' jurisdiction to fill the legislative gap identified, a minimal role for federal legislation and a virtual universal opposition to the introduction of provincial laws (by incorporating them in a federal law) to deal with this issue.

21 Protecting the interests of children is a central concern of First Nations in the development of any response to matrimonial real property issues. For most First Nation people, this means placing the interests of children ahead of spouses and it means recognizing their rights and interests as a function of matrimonial property law in a much more explicit way than is the case off reserves.

22 First Nation people insist that the interests of First Nation children require protecting the collective First Nation interests in reserve lands. The logic of this position is rather straightforward: if new federal legislation was to affect the collective interest of First Nations in their lands in a way that would open up reserve lands for piece-meal dismantlement by allowing its alienation to others, the future of First Nation children in this and future generations will be placed in jeopardy in many aspects – cultural, social and economic.

23 Beyond this universal position, there are a range of values, laws and practices among First Nations concerning the role of individual interests in reserve lands.

II. Themes

24 Understanding what First Nation people are saying about matrimonial real property issues on reserves requires careful listening. Federal laws, provincial laws and First Nation laws, policies and customary practices collectively affect First Nation families on reserves and the homes in which they live in various ways. All of these must be considered in developing a viable legislative response to address the current legislative gap (meaning a lack of applicable law) in regard to matrimonial real property on most reserves in Canada. It is an understatement to say there is a complex interplay of interests and rights flowing from the current state of federal, provincial and First Nation law that affects matrimonial property on reserves.

25 The matrimonial real property on reserves consultation process confirmed that there are citizens requiring assistance from their governments to get them through times of family crisis. This need is an immediate one. This reality has been shaped by federal interference with First Nation cultural values and by a continued lack of recognition of First Nation legal traditions. For example, the fact that there are more negative impacts, more often for First Nation women and children flows not only from the current social roles of women but just as significantly, from historic and discriminatory impacts of the *Indian Act*. The task of recognizing First Nations' inherent jurisdiction over their lands and citizens in respect to matrimonial real property is a matter of urgency, in order to ensure the application and enforcement of laws suitable to the unique legal, cultural and social context of First Nation communities.

Overview of Key Themes

26 Throughout the three phases of the matrimonial real property process, several key themes were evident. The following provides an overview in alphabetical order of the most prominent themes articulated to me and represents my analysis of what I have heard as a neutral body. These themes can be a guide in the development of legislative and non-legislative options.

27 *Access to Justice and related Programs and Services*
The current absence of basic legal protections for matrimonial real property interests and related institutions, program and service supports (such as community-based dispute resolution mechanisms) affect all First Nation citizens. The consultations have demonstrated that the gap respecting matrimonial property protections on reserves involves more than a gap of substantive law, but includes a gap of equal scope and significance in regard to access to court systems, legal services and dispute resolution mechanisms at the community level.

28 *Concerns about the Adequacy of the Consultation Process*
Fundamental concerns of First Nations were the meaningfulness, structure and time frame of the consultation process. While there exists widespread acknowledgement that matrimonial real property issues on reserves must be addressed, First Nations consistently expressed concern about the time frame allocated to consultations and a resulting inability of First Nation leaders to engage those who will be most impacted – community members. First Nations indicated that a government-imposed time frame, a consultation framework not developed jointly with First Nations, and the pre-determined outcome of having legislation in the Spring of 2007 were not respectful of treaty and aboriginal rights nor consultation principles as articulated in Supreme Court of Canada jurisprudence. Frustration and mistrust were often expressed about having to respond to government-determined priority agendas, with little opportunity to jointly shape government priorities.

29 *Fundamental Human Rights*
International human rights values were a common reference point for most, if not all involved in the matrimonial real property process. This included discussion of the relevance and relationship of the right of self-determination to the full enjoyment of individual human rights. Past discriminatory federal legislation and policy combined with the lack of matrimonial real property protections under the *Indian Act* were considered primary barriers preventing First Nation women from fully enjoying their

fundamental human rights. First Nation governments recognize the importance of fundamental human rights.

30 *Housing*
Addressing the longstanding housing shortage that is common to First Nation communities was considered a key factor in developing a viable solution to matrimonial real property issues and would require action over the short, medium and long term.

31 *Importance of Traditional Values, Practices, Knowledge Systems and Laws*
First Nation people clearly articulated that traditional values, practices, knowledge systems and lawmaking in regard to family, land, lawmaking and problem solving are most respected by, and appropriate to, First Nations. These must be reclaimed, recognized and incorporated into any solution. Since traditional practices and approaches vary among First Nations, solutions to matrimonial real property must have the capacity to incorporate and accommodate a diversity of traditions and customs.

32 *Interests and Well-being of Children*
Without exception, First Nation people have said that first and foremost any solution to matrimonial real property must consider and respect the rights and interests of children and future generations.

33 *Membership and Indian Status Issues*
Issues relating to First Nation citizenship, band membership and Indian status arose throughout the process. In particular, the impact of past discriminatory provisions of the *Indian Act* relating to Indian status and band membership combined with policies of assimilation were said to have had extremely negative impacts on the position of First Nation women in their communities in relation to governance, property and civil rights. These impacts continue to be felt today and necessarily complicate the task of developing legislation to address matrimonial real property.

34 *Protection of First Nations Lands*
The protection and preservation of First Nation lands for future generations is of paramount concern nation-wide. The need to appropriately balance collective and individual interests in reserve lands was consistently raised as an issue that must be worked through. Matrimonial real property solutions must not lead to the alienation or diminishment of reserve lands.

35 *Resources and Capacity to Implement Solutions*
First Nation people have consistently stated that First Nation governments must be provided with adequate human and financial resources for implementation, administration and enforcement of matrimonial real property remedies. Experiences relating to the implementation of changes to the *Indian Act* as a result of Bill C-31 were often conveyed as a lesson in what should be avoided in implementing solutions to matrimonial real property issues. The lack of adequate resources for the development of codes and for housing and infrastructure following the passage of Bill-31 created conflict and chaos within communities, as a result of undelivered government commitments at that time. Resourcing of implementation is an essential element of any viable solution.

36 *Respect for Aboriginal and Treaty Rights, Agreements and First Nation Laws*
Any solution to matrimonial real property issues must not abrogate, derogate or otherwise diminish aboriginal and treaty rights to collective lands and traditional territories or inherent rights to self-government. Existing laws developed through comprehensive land claim agreements, self-government agreements, the *First Nation Land Management Act* and other community-developed solutions must be respected. Where treaties have been signed in this country, the treaties set out the political relationship of First Nations with Canada; there is no need for additional agreements. Beyond these requirements, First Nations say it is time for Canada to act in an honourable way to respect aboriginal and treaty rights by developing an agenda for reconciliation.

37 *Solutions must be Developed and Implemented by Communities, for Communities*
First Nation people unanimously expressed the view that incorporation of provincial laws on reserves will not work, and that there is no one solution that is appropriate to all First Nation communities. Varying customary practices, governance structures, and land-holding regimes are examples of factors of relevance to each community in their determination of the most appropriate solutions for their community members.

38 *The Lack of MRP Protections is not an Isolated Issue; Solutions cannot be Isolated to MRP*
Matrimonial real property issues do not exist in isolation. They affect and are impacted by issues of violence, poverty, child welfare, housing, governance, wills and estates, residency, membership, land registries, resources, capacity, access to social services and justice, and others. As such, any matrimonial real property solution that is strictly confined to division of property on marital breakdown will be limited in its ability to contribute to meaningful improvements to community well-being.

39 *Violence*
Violence is unacceptable. Just as important as legal protections under the law, such as making exclusion orders available and ensuring their enforcement against violent spouses, is the need for program and service support for women, men and families aimed at prevention of violence as well as support and healing when violence does occur.

40 *Women Must Have a Stronger Voice in their Communities*
First Nation men and women consistently said that matrimonial real property issues are not about men versus women. Rather, these issues concern fairness and human rights. First Nation men and women have expressed the belief that a stronger voice for women is required in communities as existed in their traditional governments.

Reconciling Rights, Interests and Mandates

41 Understanding by decision-makers at all levels is a requirement for meeting the collective and respective interests of First Nation women, men and children. An understanding of First Nation people's experiences and interests is required to appreciate the values and mandates brought to this process by the AFN and NWAC. Throughout the process of consultation, dialogue and consensus-seeking, both organizations stressed the need to:

1) respect and recognize First Nations' jurisdiction and legal traditions;
2) reclaim the rightful place of First Nation women as equals in their communities with respect to governance and property;
3) acknowledge the historic reality of colonization, its ongoing impacts and the responsibilities of the Crown in addressing its role in this experience (meaning the Crown is responsible for launching and maintaining the process of colonization and continues to control many of the levers for reversing it in a manner consistent with reconciliation).

42 The interests and mandates of the First Nation organizations involved in the consensus-seeking process did vary and they varied precisely because the *Indian Act*, and policies flowing from it, have produced more negative impacts for First Nation women. The experience of First Nation women with colonization is in many ways distinct. Historically, federal law and policies have had different and typically more negative impacts on First Nation women. This history is well documented.[11]

[11] See for example, Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, Ministry of Supply & Service Canada, 1978); Patricia Monture-Angus, Thunder in My Soul: A Mohawk Woman Speaks. (Halifax: Fernwood Press, 1995); Teressa Nahanee, "Indian Women, Sex Equality and the Charter" in Women and the Canadian State. Andrew, C. and Rodgers, S. eds.(Montreal & Kingston: McGill-Queen's University Press, 1997) p. 89; Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nation women" in *Women and the Canadian State* (Montreal & Kingston: McGill-Queen's University Press, 1997) at 64; Sally Weaver, "First Nation women and Government Policy, 1970-1992", Discrimination and Conflict, Chapter 3 in S. Burt, L. Code & L. Dorney (eds.) *Changing Patterns: Women In Canada*, (Toronto: McClelland & Stewart, 1988); Canada, Report of the Royal Commission on Aboriginal Peoples, 1997, Vol. 4, Chapter 2.

43 Kathleen Jamieson's seminal work on this subject describes the resistance of many First Nations leadership in the East and West to the explicit sex discrimination imposed by the federal Indian legislation from its earliest days and their resistance to the expulsion and eviction of First Nation women from the communities. Jamieson says: "*The Indians themselves objected strenuously to penalties being imposed on Indian women but were ignored. In 1872 the Grand Council of Ontario and Quebec Indians (founded in 1870) sent a strong letter to the Minister at Ottawa protesting among other things section 6 of the 1869 Act in the following unmistakable terms: 'They (members of the Grand Council) also desire amendments to Section 6 of the Act of 1869 so that Indian women may have the privilege of marrying when and whom they please; without subjecting themselves to exclusion or expulsion from their tribes and the consequent loss of property and the rights they may have by virtue of their being members of any particular tribe The Indians' request went unheeded."*[12]

When First Nation people had their first opportunity to appear before a Parliamentary Committee on the question of the *Indian Act* in 1946 and 1947, objections were raised by First Nation leadership about involuntary enfranchisement: "*A number of representatives from bands and associations submitted briefs and gave testimony to the Joint Committee in 1946 and 1947. Most of these groups emphasized that decisions as to membership of the band should be the decision of the band and that involuntary enfranchisement should be abolished. The North American Indian Brotherhood, the Indian Association of Alberta, the Native Brotherhood of British Columbia, and the Union of Saskatchewan Indians all made strong statements on this. This was considered a major breakthrough. Indians had not been consulted before as to their wishes*."[13]

These pleas were rejected by the Indian Affairs Department of the time on the rationale that "*by the alteration of the definition of Indian by the Statute of 1876 the Dominion very substantially reduced the number of people for whose welfare it was responsible and by that action passed the responsibility on to the provinces for thousands of people, who, but for the statute of 1876, would have been a federal responsibility for all time*."[14]

44 The consequences of more negative impacts for First Nation women means at times, the respective mapping by First Nation organizations of the path out of colonization towards re-empowerment both of First Nation women within their communities and of First Nation governments in the renewal of their relationship with the Crown is viewed differently. For example, priority setting and process issues may not be seen the same way by the two organizations. This could provide an opportunity for government to exploit these differences to its own advantage. However to its credit, in launching this process with an invitation for early involvement of the AFN and NWAC, the government instead created a process that aims at promoting cohesion within the First Nation community in the search for a solution. This will require an ongoing commitment by all three parties.

45 A key aspect of this process that contributed to relationship building was the framing of the question concerning the relationship between collective and individual rights. In past policy discussions there have often been implicit assumptions that First Nation people must place a priority on collective rights over individual rights or vice versa. The presentation of such a "choice" is not consistent with the Constitution or international human rights theory. Notably however, my mandate explicitly requires me to make a recommendation to you as Minister on matrimonial real property that reflects a balance; that is, a point of harmony or coherence between the two sets of rights rather than assuming that conflict or precedence is inevitable. Every effort was made to develop solutions for matrimonial real property issues that would ensure a respectful balance between the collective and individual rights of First Nation people.

46 The promotion of relationship building and understanding within First Nation communities will depend on the steps taken by Canada following this consensus building exercise. The further the project advances towards law, the more anxious the respective parties will become about ensuring their

[12] Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, Ministry of Supply & Service Canada, 1978) at p. 30.
[13] *Ibid*, at p. 57.
[14] *Ibid,* at p. 58.

interests and objectives are met in the final product. There will be a need for ongoing discussions to build on the good work achieved through this process, rather than assuming that joint work is completed.

47 The role, mandate and interests of INAC are another important consideration. INAC is in the unenviable position of having a mandate rife with potential for conflict and for conflict of interest. The Department is responsible for protecting Crown interests (financial and legal), is generally expected to 'reduce expectations of the client population' (with respect to financial expenditures in particular), while at the same time, being responsible for respecting and affirming aboriginal and treaty rights, protecting human rights and advancing gender equality in the discharge of its statutory mandate.

48 Despite these challenges, each organization appreciates the priority of interests each is advancing. The challenge for the table was twofold: first, how to meet the multitude of interests flowing from colonization on diverse First Nations including the identifiably distinct negative impacts on First Nation women; and second, how to reconcile these interests in respect to aboriginal and treaty rights including First Nations jurisdiction, individual human rights and the assumed sovereignty of the Crown.

49 Stories, impacts and understandings unfold in different ways. One story or experience is not more valid or true than another. They are all part of a common history that is relevant to the search for solutions for First Nation families. Solutions are needed that reclaim First Nation legal and cultural traditions and restore First Nation women to their rightful and equal place in their communities. Each story represents a reality that must be acknowledged, respected and understood as a first step towards reconciliation and self-determination. In other words, First Nation citizens including First Nation women are marking a path towards reclaiming their way of being, as nations and individuals, with hope and dignity.

III. Matrimonial Real Property On Reserves: Context and Concepts

What is "Matrimonial Property"?

50 Concepts of "matrimonial property" in current provincial and territorial laws off reserves are a relatively recent development in Canadian law. The introduction of legal principles that recognize the equal value of men and women and which treat marriage as a partnership of equals in property matters dates to the late 1970's.

51 Every province and territory now has laws addressing rights between spouses during marriage and upon marriage breakdown. A generic term for these laws is "matrimonial property law". There are other generic terms used by different governments such as "family property", "family assets" and "marital property".

52 Each province and territory defines what matrimonial property is, and most provide a definition of the 'matrimonial home' or equivalent term. Each province and territory determines which conjugal relationships are included within their matrimonial property laws. Some provinces only extend their matrimonial property regimes to persons married under provincial law, others include common law relationships as well as married couples and still others make specific provisions in relation to same sex relationships.

53 Matrimonial property can include homes and the land they sit on and other property used for a family purpose, such as cars, cash, and household furniture. In common law jurisdictions, the concept of property (things that individuals can own) includes two main categories of property - "real property" and "personal property". Real property includes land and things permanently attached to the land such as a house. Personal property is things that can be moved such as furniture or money. In civil law there is a similar distinction between property that is "immovable" like land and property that is "movable" like money, cars or furniture.

Functions of Matrimonial Property Law

54 In all provinces and territories, matrimonial property laws provide rules that can guide spouses, when making their own agreements about property during marriage or upon marriage breakdown. When spouses cannot agree, these laws provide guidance and authority for judicial decision-makers to decide matters in dispute between spouses. These laws provide a comprehensive regime for determining property disputes between spouses whether real or personal, and take into account the particular land regime of the province or territory. They define what constitutes matrimonial property (both real and personal) and there are important differences among provinces and territories in this regard.

55 Off reserves, provincial and territorial laws can affect the rights of spouses in their matrimonial real property – both during marriage and upon marriage breakdown. For example, there are specific protections for spouses in regard to the family home during marriage such as prohibiting the sale of a family home without the consent of one's spouse. In cases of relationship breakdown, in every province and territory, a spouse can apply to court for interim exclusive possession of the family home upon marital breakdown. Domestic contracts can be enforced as orders of the court. Provincial and territorial matrimonial property law also determines the ultimate disposition of property between spouses by providing formulas for dividing matrimonial property in ways that take into account the value of the family home and other forms of matrimonial real property.

Jurisdictional Issues Arising from the Legislative Gap Respecting Matrimonial Real Property On Reserves

56 Off reserves, provincial governments have jurisdiction over 'property and civil rights'. This is a very broad head of power that includes many matters including individual property rights, family law, wills and estates and human rights. Territorial governments exercise delegated federal lawmaking powers in these areas. There are some areas of concurrent jurisdiction with the federal government because of federal jurisdiction in relation to divorce and the definition of marriage. Provincial governments also have exclusive jurisdiction over the administration of justice in the province.

57 Understanding the limited reach of provincial and territorial laws to reserve communities is necessary to understand the current situation with respect to matrimonial real property on reserves. This initiative concerns a 'legislative gap' in regard to 'matrimonial real property' that affects most reserves in Canada. The term 'legislative gap' means there is a lack of applicable law (from federal, provincial or First Nation sources) to determine disputes concerning matrimonial real property for the majority of First Nation reserve communities. The goal of the current process was to find a consensus on the respective roles of federal, provincial and First Nation laws to fill that gap.

58 Two cases concerning the extent to which provincial laws on matrimonial property may be applied to individual interests in reserve lands reached the Supreme Court of Canada in 1986 – *Derrickson* v. *Derrickson*[15] and *Paul* v. *Paul*.[16]

59 The Supreme Court decided that provincial laws cannot apply in any way that would change any individual property interest a First Nation person may hold under the *Indian Act*. In *Derrickson*, the court also said provincial laws of general application relating to matrimonial property can apply of their own force (without incorporating them in a federal law) to interests in reserve lands so long as individual real property interests under the *Indian Act* are not changed. For example, provincial laws can be used to issue a compensation order, in place of division and sale of a property. Such compensation orders can require one spouse to pay another in order to divide property equally. These orders can take into account the value of a home located on land held by Certificate of Possession (inclusive of the value of the use and occupancy of the land allotment itself).

60 In the *Paul* case, the Supreme Court decided that provincial law could not be used to grant an order to Mrs. Paul for interim possession of a matrimonial home situated on a reserve and acquired by her husband by way of a Certificate of Possession under s. 20 of the *Indian Act*. These decisions continue to have an impact. In 2004, the principle in the *Derrickson* and *Paul* cases is applied in the Northwest Territories in regard to a matrimonial home on the Hay River reserve. The Northwest Territories Supreme Court held that by virtue of Section 91(24) of the *Constitution Act* and the federal *Indian Act* it did not have jurisdiction to grant an order for interim exclusive possession of the family home.[17]

61 There are several reasons for the current legislative gap affecting First Nations subject to the *Indian Act* land regime:

1) The division of powers between the federal and provincial governments means that provincial/territorial laws can apply to matrimonial property on reserves but cannot be used to change interests in real property on reserves whether collective or individual;
2) While the federal government has jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867* in regard to "Indians, and lands reserved for the Indians", there is no federal legislation addressing this matter;
3) The jurisdiction of First Nations respecting matrimonial real property is not recognized by the federal government.

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15 *Derrickson* v. *Derrickson*, [1986] 2 C.N.L.R 45 (SCC).
16 *Paul* v. *Paul* [1986] 1 S.C.R. 306 (SCC).
17 *Buggins* v. *Norn* [2004] N.W.T.J. No. 85.

62 The federal analysis of this gap is rooted in non-aboriginal notions of individual property ownership and the relationships of property, family and the proper role of law in regulating relationships to land and family relations. The federal government relies heavily on provincial matrimonial property law as a standard of comparison in analyzing matrimonial real property interests on reserves. It is not that provincial and territorial laws are inherently wrong in their approach and content with respect to off-reserve property regimes and family relationships. The question is whether all of these provincial-type remedies are suitable for the particular land regime of *Indian Act* reserve communities and whether some new approaches and remedies might work better. The discussions held over the past few months have provided much valuable information on this subject by drawing out First Nation perspectives and values.

Acknowledging and Respecting Indigenous Legal Traditions

63 Noted legal scholar John Borrows has suggested the time has come to accommodate First Nation legal traditions within the Canadian legal framework. Canada already recognizes and respects diversity through 10 sovereign provincial jurisdictions as well as distinct common law and civil law traditions. He argues that extending respect and welcome to indigenous legal traditions will reflect the reality of indigenous life in Canada today and help build the protocols required to achieve reconciliation. This would not be a new development but rather the resurrection of an earlier pattern of interaction and knowledge exchange in which First Nations and Europeans influenced one another.

64 Borrows notes that when people from other continents arrived on the shores of North America, indigenous laws, protocols and procedures set the framework for the first treaties between Indigenous peoples, and between Indigenous peoples and European people of various nations. Early marriages between Indigenous women and European men were solemnized according to Indigenous legal traditions.

65 The fact that the common law recognized Aboriginal customary marriages was one of the reasons the B.C. Supreme Court in the *Campbell* case[18] found that the Nisga'a held a pre-existing inherent right of self-government.

66 Participants in both AFN and NWAC discussions said that First Nation people want to see matrimonial property law that incorporates First Nations views of land and family. First Nation people are saying that indigenous legal traditions should be recognized as part of Canada's legal system.

Measuring the Gap in Access to Matrimonial Property Rights on Reserves

67 Much of the federal government's discussion of matrimonial real property issues on reserves has been framed by a comparison of federal understanding of what is happening on reserves, concerning rights to the family home, to what happens off reserves under provincial and territorial laws.

68 The dialogue and consultation sessions held by NWAC and AFN framed issues within the history of rights recognition and the extremely negative experience with federal interference in gender relations and in property matters in general in First Nation societies.

69 In other words, the relevant standard in federal analysis is what the law provides off reserves, while for First Nations the relevant standard is recognition of the validity of First Nation values and traditions in relation to land and family.

70 Key characteristics of the current legal system to consider in addressing matrimonial real property rights on reserves are:

[18] *Campbell* v *Attorney-General (British Columbia)* [2000] B.C.J. No. 1524 (B.C.S.C.)

1) Matrimonial real property rights off reserves were not developed, and do not exist today, in isolation from provincial laws relating generally to family law, property law and estate law. There is much diversity among provinces and territories on some key policy issues such as the treatment of common law and same sex spouses. Provincial and territorial laws that affect 'matrimonial real property' off reserves are part of a much larger and comprehensive legal framework for property and family law in general.
2) Many provincial and territorial family laws do apply on reserves, such as custody and support laws as well as matrimonial property law not affecting rights in reserve land;
3) Issues relating to inherent First Nation rights and jurisdiction concerning land and family law arise from the pre-existing rights recognized and affirmed by section 35 of the *Constitution Act, 1982* and Supreme Court of Canada decisions addressing how the Crown must conduct itself in developing laws and policies that can or may affect section 35 rights;
4) The distinctiveness and diversity of individual interests in land and housing on reserves and the distinctive legal framework for property rights interests on reserves have numerous sources, including First Nation traditional law, policy and practice, the *Indian Act* and the Constitution;
5) There is not only a legislative gap in substantive law respecting matrimonial real property in comparing the situation off reserves to the situation on reserves; there is an equally significant and disturbing gap in access to the court system, access to legal aid, adequate housing, policing, enforcement of laws, capacity and resources for land registry systems and many other areas.

71 The use of current provincial and territorial laws as a standard to measure what is happening on reserves seems to flow logically from the federal objective of wanting to place First Nation people on reserves in at least a comparable position to people off reserves in regard to matrimonial property rights. This objective is based on a human rights equality rationale and it is an objective and rationale shared with the Native Women's Association of Canada. It is a policy objective that flows understandably from the considerable mass of domestic and international human rights reports calling for action. However, if this objective is to be taken as a genuine one, then the other pre-requisites for the enjoyment of matrimonial property rights also must be considered. These involve more than just substantive law respecting matrimonial real property, but other determinants of access to matrimonial property rights in modern democracies such as access to the justice system and functioning land regimes reflective of the people they are intended to serve.

72 The legislative gap experienced by First Nation people at the community level in respect to matrimonial real property is just as much fuelled by a lack of access to any justice system, by a lack of housing options when marriages break down and by a lack of institutional and capacity development, to name a few. This means a right to bring an application to enforce matrimonial property rights and remedies could amount to nothing more than a theoretical right without physical access to court or financial resources or legal aid for the vast majority of First Nation people experiencing marital breakdown. This will be the case for most First Nation people without a larger agenda to address these unresolved issues and policy linkages. There is an urgent need for short-term measures to address dispute resolution needs and other administration of justice issues such as enforcement of court orders and First Nation laws. These points were emphasized by First Nation people throughout the consultation and dialogue sessions.

73 If First Nation governments are to be looked to, to provide rights and remedies comparable to those available under provincial and territorial laws, while taking into account the distinct nature of the land regime in First Nation communities, there must be a comparable scope of recognized jurisdiction, resources, capacity and institutional development. Otherwise First Nations would be placed in a catch-22 situation – they would be held to the same standard as provincial governments but not have the resources and capacity to achieve it.

The Relationship Between Collective and Individual Rights

74 First Nations necessarily have to deal with issues of collective and individual property rights, and the larger relationship to the Crown in dealing with the matrimonial real property. The unique nature of

the land regime on reserves and its connection to aboriginal title and other aboriginal and treaty rights requires this. This is a constitutional reality for First Nation governments and the Crown.

75 The importance of finding a coherent balance between collective and individual rights is reflected in my mandate which calls for a recommendation that will ensure "There is an acceptable balance between individual and equality rights guaranteed by ss. 15 and 28 of the Charter and collective rights recognized in section 35 of the *Constitution Act, 1982* and referenced in s. 25 of the Charter."

76 Section 15 of the *Canadian Charter of Rights and Freedoms* (Charter) provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

77 Section 25 of the Charter provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

78 Section 28 of the Charter provides:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

79 Section 35 of the *Constitution Act, 1982* provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

80 There are several points to note with respect to this aspect of my mandate. First of all, the relationship between ss. 15, 28, 25, 35(1) and 35(4) is ultimately determined by the Constitution and cannot be changed as a matter of policy or federal statute. In other words, it is what it is. Second, with respect to section 25, there are no binding Supreme Court of Canada decisions on the issue and relatively few decisions at lower levels. Third, neither Charter nor section 35 rights are absolute – both may be infringed upon in circumstances defined by tests the courts have developed for each. More generally the Supreme Court of Canada has adopted a purposive approach to the interpretation of both the Charter and section 35 aboriginal and treaty rights. Reconciliation is one of the recognized purposes of section 35. This purpose would seem to be relevant when issues arise concerning proposed federal legislative initiatives and respect for First Nation legal traditions.

81 Despite these complexities, lawmakers must form an opinion. They cannot say they don't understand a provision of the Constitution, nor can they treat any provision as empty of content. They must give every provision a meaning and consider existing case law. In the case of section 25 of the Charter, while there is not yet a binding Supreme Court of Canada decision, government decision-makers are required nevertheless to make their best judgment, based on decisions that are available and other relevant authorities. For example, Madame Justice L'Heureux-Dubé suggested respecting section 25 and 15 of the Charter, in a non-binding opinion that "*The contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history*."[19]

82 Guidance may also be found in international human rights theory on this question of balance. International human rights theory says that human rights are inherent (cannot be extinguished), they are intrinsically related to one another and they cannot be ranked in priority. There is a need for federal policy to integrate and reflect an understanding of "aboriginal rights" as an aspect of human rights; in much the same way that international law recognizes the right of peoples to self-determination as a fundamental human right.

83 The indivisibility and interdependence of human rights has been a fundamental principle of international human rights theory from its earliest days.[20] The 1993 Vienna Declaration of the World Conference on Human Rights reaffirms this principle in paragraph 5, which includes the right to self-determination (referenced in paragraph 2 of the Vienna Declaration): "*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms*."[21]

84 At the World Conference on Human Rights, Dr. Erica-Irene Daes, an internationally renowned human rights expert stated: "*Indigenous peoples world-wide share an alternative vision of human rights and democracy, which is compatible with universally recognized human principles and values, but stressed relationships and reciprocal responsibilities among families, clans, communities and nations. It even includes the responsibilities of human beings to the animals, plants, the environment as a whole, and the other species of living creatures with whom humans share the earth. Indigenous peoples vision of democracy emphasizes the centrality of the right of each individual to human dignity and to the integrity of his or her identity as a member of a family, clan, and a nation. ….Since Indigenous Peoples have an alternative vision of democracy, they should be given the opportunity to provide us with a source of inspiration in our struggle for democracy and effective protection of human rights and freedoms worldwide. But they can only do this if their own distinct systems of government survive. It is essential that they be empowered to exercise political, legal and economic autonomy, including control of their own environment and process of sustainable development*."[22]

85 The long debate over First Nation collective rights and the protection of individual human rights, particularly over issues having special impacts on women, has deep roots. Too often, the debate has been framed by an assumption that First Nation people must necessarily choose between their collective rights in land or to govern themselves on the one hand, and the enjoyment of individual human rights to equality and dignity on the other. It is time for a new direction and new policies that do not insist on such a false choice being presented to First Nation people over and over again. Balancing collective and individual rights should not necessarily require choosing one set of rights

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19 *Corbiere* v. *Canada* [1999] 2 S.C.R. 203 (SCC) at para 54.

20 John Humphrey, Preface to *No distant millennium: The International Law of Human Rights*, (Paris:UNESCO, 1989).

21 United Nations, *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23, 12 July 1993.

22 Professor Erica-Irene Daes, Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, Address at the World Conference on Human Rights, Vienna Austria, Austria Centre, 18 June 1993.

over the other. I believe the recommendations made in this report reflect a balance between collective and individual rights that respects both.

86 There are different viewpoints within the First Nation community about the best way to meet international human rights standards within their nations, just as there are among provincial and federal governments who each have their own human rights law. Nevertheless, there is 1) a general acceptance of international human rights values and; 2) consensus that the implementation and respect of section 35 rights is as much a part of Canada's international human rights obligations as the protection of individual human rights.

87 In my own experience, First Nations governments are just as responsible, accountable and transparent as other governments in Canada. Further, the lawmaking and decision-making of First Nation governments will be subject to human rights review at several levels: the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, international human rights standards, indigenous visions of human rights and the natural impulse of First Nation leadership to do right by their citizens. It would be a double standard to say the least if First Nations were made subject to prescriptive standards beyond these, based on some assumption that First Nation governments will take as long as the federal government to act on the subject of matrimonial real property.

Barriers to Change and the Need for a Policy Framework for Reconciliation

88 Historically, two competing and conflicting goals have been carried out through the *Indian Act* – protection of the property interest held collectively by First Nations in their lands, and policies of assimilation. The latter included efforts to get First Nation people to adopt individual ownership of land (through the power and influence of Indian agents for example). While many aspects of the *Indian Act* are outdated, there is one key function of the Act that is of much value to the vast majority of First Nations, and that is its role in protecting the collective land base.

89 In moving away from past assimilative goals, there has been a long history of conflict over what to do with the *Indian Act*. This occurs despite fairly widespread opinion among First Nations and within government that many aspects of the *Indian Act* present serious barriers to development and full enjoyment of human rights.

90 One example of a past conflict over the *Indian Act* is the Joint National Indian Brotherhood (NIB)-Cabinet Committee that operated from 1974-1976. This process ended in a poor outcome for both the NIB and for First Nation women. The joint process foundered on the insistence of the NIB for a comprehensive approach to reform of the *Indian Act*, while the federal government insisted on a sectoral approach.[23] For First Nation women, the long deadlock between NIB and the federal government, combined with litigation over the compulsory enfranchisement of Indian women, ultimately resulted in the enactment of s. 67 of the *Canadian Human Rights Act* (CHRA). This measure was intended to be temporary in order to protect collective rights while discussions continued on the entire *Indian Act* including the enfranchisement provisions.[24] Section 67 exempts decisions made under the authority of the *Indian Act* from human rights review under the CHRA. Section 67 was needed to protect collective interests prior to their explicit constitutional protection in 1982.

91 Conflict was very evident in relatively recent initiatives to amend the *Indian Act* – both successful and unsuccessful ones – the passage of Bill C-31 in 1985 and the failure of the Bills proposing enactment of a First Nations Government Act in 2000-2001. These recurring conflicts and deadlocks over *Indian Act* change are a puzzling question to many non-First Nation people.

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[23] Harold Cardinal. *The Rebirth of Canada's Indians*, (Edmonton: Hurtig Publishers, 1977) pp. 114-115.at

[24] Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, Ministry of Supply & Service Canada, 1978).

92 The answer to this question lies in the common experience that diverse First Nations have had with a long and unhappy history of sequential amendment to the *Indian Act*. There is ample evidence of unintended negative results flowing from this approach. This has led to a wide-spread conviction by First Nation people that *Indian Act* amendments simply replace old problems with new ones. First Nation people have had to live with the real life consequences of this approach for the past 130 years. Not surprisingly, there is a firmly held view that it must be First Nation people and not the federal government who should control the process of change in their communities. This includes determining the land regime that should apply to their lands. Nevertheless, each federal government, regardless of its political orientation has returned to the formula of sequential amendment - a formula that from a First Nation perspective has proven consistently troublesome.

93 From a non-First Nation viewpoint, there is an inherent logic of sequential amendment: modest sized reforms can be undertaken and led by sector specialists matching the organization of the Department. Financial expenditures and policy risks can be controlled. The theory sounds good, but from a First Nation viewpoint, experience with its implementation has demonstrated that everything is connected to everything else, meaning minor adjustments to one part of the *Indian Act* - however well intentioned - invariably lead to unexpected impacts and negative results elsewhere. The effort to eradicate blatant gender-based discrimination resulted in the introduction of other forms of discrimination, retention of residual gender based discrimination and highly negative impacts on identity within families. The failure to provide adequate resources for implementation to accompany legislative change is another lesson learned from the "C-31" experience. Secondly, sectoral reforms can be successful, such as the *First Nations Land Management Act*, only where they are led by First Nations and premised on First Nation consent and jurisdiction.

94 An additional factor is that *Indian Act* amendment issues are inextricably related to issues of rights recognition – meaning the Crown's obligation to recognize and respect the rights recognized and protected by section 35 of the *Constitution Act, 1982*.

95 Another barrier to change is that too often when progress is made to develop a process for addressing issues relating to rights recognition and the *Indian Act*, initiatives have been stopped in their tracks by a change in Minister or government, and much good work has been lost. An example of this is the Joint AFN-INAC Initiative on Policy Development (1999-2001) where two years worth of joint work was swept aside when a new Minister of Indian Affairs decided that the introduction of a First Nations Governance Act was a key priority instead. Following the campaign to stop the FNGA initiative, First Nations worked together to develop an alternative roadmap for change and took this plan to the federal government in 2004. The result was a First Nations-Crown Accord reached in 2005 to address many outstanding issues - rights recognition, consultation policy, policies to govern federal legislative initiatives and many others.

96 For the Assembly of First Nations, the government has a commitment to maintain in ensuring a comprehensive plan including new policies and new supports for communities is jointly developed respecting the recognition and implementation of First Nation governments. Under the 2005 First Nations-Crown Accord, joint work is to be undertaken in the following areas:

a) New policy approaches for the recognition and implementation of First Nation governments, including mechanisms for managing and coordinating renewed and ongoing intergovernmental relationships, and assessment of the potential for a 'First Nation Governments Recognition Act';
b) New policy approaches to the implementation of treaties;
c) New policy approaches for the negotiation of First Nation land rights and interests;
d) A statement of guiding principles for reconciling section 35 rights in the context of ongoing relationships with First Nation peoples, their governments, and Canada;
e) New or existing opportunities to facilitate First Nations governance capacity building, working with First Nations communities and organizations to jointly identify approaches that support the implementation of First Nation governments, including programs, policy, institutional and legislative initiatives.

97 For its part, NWAC is seeking action and redress in several broad areas they believe are linked to the MRP process, such as:

1) Ensuring band member and treaty services and programs are available to women regardless of whether they are living on or off reserves;
2) A mechanism to implement indigenous legal traditions;
3) Access to alternative dispute resolution mechanisms;
4) Public education and communication activities relating to matrimonial real property and domestic violence;
5) Effective anti-violence measures;
6) Culturally relevant gender-based analysis.

98 NWAC is also seeking remedial measures for addressing colonial impacts on women's leadership including:

1) Full involvement of women in the development of ADR systems;
2) Full involvement of women in the development of public education;
3) Full involvement of women in anti-violence deployment;
4) Compensation for harms under the *Indian Act* and losses linked to matrimonial real property;
5) Training, education, employment and business supports for women;
6) Choice regarding band membership for women and children;
7) Repatriation assistance to women and their communities.

NWAC entered into an Accord with the federal government in 2005[25] for cooperative policy development but has not yet received funding under this agreement for its implementation.

99 It seems clear that a broad policy framework to manage the process of change is needed; one that is premised on two fundamental principles:

1) Federal policies and legislative initiatives are to be based on a recognition of First Nation jurisdiction and respect for aboriginal and treaty rights;
2) Both federal and First Nation governments have obligations to respect and implement internationally-recognized human rights values.

100 A broad policy framework would provide support and coordination for sectoral initiatives and assist in addressing the inevitable areas of overlap and policy linkages that cannot be addressed in a single sectoral legislative initiative or even in a series of sectoral initiatives. In the case of matrimonial real property as this report will show, there are a large number of unresolved issues vital to achieving a comprehensive matrimonial property regime but which cannot be addressed through a sectoral initiative alone – issues relating to land management, land registries, wills and estates, administration of justice, self-government, First Nation citizenship, support and custody issues to name a few. Among lessons learned in this process, is the need to ensure sufficient time to examine and discuss with First Nations any future proposal for legislative action.

101 The history of the long debate over the future of the *Indian Act* demonstrates the deep roots of several persistent phenomena:

1) A struggle over who should control the process of change in First Nation communities (the federal government or First Nation governments);
2) A fundamental difference of opinion about whether real change can be achieved through sectoral initiatives driven by the federal government and in the absence of a broad policy framework developed with First Nations relating to long term change;
3) A struggle to overcome divisions within communities brought by the *Indian Act*'s treatment of women and their rights;
4) A stop-and-start history of First Nations-Canada initiatives aimed at developing a comprehensive agenda for change, often due to changes in Ministers and governments at the federal level.

[25] A copy of the 2005 NWAC-Canada Accord can be found on the Indian Affairs website at http://www.ainc-inac.gc.ca/nr/prs/m-a2005/02665nwac_e.html.

IV. Legal and Social Context of Landholding and Housing Arrangements on Reserves

102 Any new legislation to address matrimonial real property – whatever its source – would have to be applied to an existing set of legal rules creating or recognizing individual interests in reserve land. Matrimonial property laws must also take into account the current social and cultural context in which they are intended to operate.

103 Throughout the consultation and dialogue process, First Nation people said the issue of matrimonial real property concerns relationships to land and family relations, and therefore affects matters integral to the distinctiveness of each First Nation. Core issues relating to values in relation to land and family face First Nation people today, such as what is the best path to ensure the collective well-being, security and wealth of First Nation people into the future. These issues quickly became evident in the consultation process. Two aspects of the discussion should be noted: first, there is a diversity of views among First Nations about the role of individual property ownership in their communities; second, each First Nation is entitled to determine this question in accordance with their respective cultural values and their respective assessment of where their collective security and well-being lie.

104 It must also be recognized that under both common and civil law systems, provincial matrimonial property laws have been designed to apply to the particular legal interests that provincial law recognizes. These interests are known and recognized by the courts established by the province. Provincial law also determines which legal interests in real or immovable property can be registered in provincial land registry systems and the legal consequences of registration. There is also diversity in the way in which different provinces have approached land registry issues.

105 Off-reserve provincial matrimonial property regimes in common law systems apply primarily to three types of individual legal interests in land – homes owned in fee simple, rented homes, and less commonly, life estates. In Quebec, the *Quebec Civil Code* regulates rights of private property in relation to 'immovables' (land and things attached to the land and all rights in land) and 'movables' (physically movable objects). These categories are roughly equivalent to the common law concepts of 'real property' and 'personal property' respectively. Rights in land include rights of ownership and are subject to registration in the Quebec land titles registration system.

106 Off reserves, the pre-dominant symbol of individual home ownership in common law systems is fee simple title. The essence of the legal character of the fee simple interest is its unrestricted alienability. This means the holder of a fee simple interest possesses an unrestricted power to sell or otherwise transfer their interest to someone else. Off reserves, fee-simple title is a powerful symbol of financial security and is regarded as a flexible instrument controlled by individuals that promotes wealth creation. In non-native value systems, the ability of individuals to create and build their own wealth is considered the most suitable and practical way to ensure the collective wealth of society.

107 Most people are aware that the legal regime applying to reserve land is unique. What may be less clear to people living off reserves is the scope and number of very different individual interests in land, and in housing, that exist on reserves and which do not exist off reserves in either common or civil law systems. Some of these individual interests are recognized under the *Indian Act*. Many are not. Many of the ways in which First Nation people hold land on reserves or acquire housing arise from local systems for sharing the communal interest and for assigning individual rights to use and occupy land and housing. Even the manner in which housing is financed on reserves differs from that off reserves. This is significant because legal arrangements for the financing of housing can affect the scope and nature of individual legal interests in a home. The Indian Land Registry established under the *Indian Act* does not provide the security of title available off reserves in provincial registry systems, and many of the landholding arrangements the First Nation people enter into on reserves with each other and with band councils are not registered there. One authority points out there is no provision in the *Indian Act* which authorizes the adoption of regulations related to a

registry and while details of how the registry operates are set out in the Indian Lands Registration Manual, that manual has no legislative sanction.[26]

108 In addition the social and housing situations of First Nation people living on reserves differs from that of people off reserves in many ways that are relevant to matrimonial property issues. For example, more than two thirds of on-reserve housing is some form of band-owned housing. Sixty-five percent of the population on reserves live in rural, remote, or special access areas compared to eighty percent of the overall Canadian population that live in urban areas. There are also traditions in relation to clan and family interests to take into account.

109 All of these matters comprise the legal, social and cultural reality for landholding and housing on reserves to which any new matrimonial property law would be applied. This context must be taken into account in any proposals for options to improve protections respecting matrimonial real property.

Unique Legal Characteristics of First Nations' Collective Interest in Reserve Lands

110 Traditionally, First Nations have held as a pre-eminent principle governing their land regimes (including any individual interests in reserve land) the value of retaining the collective First Nation interest in their reserve lands. This principle has served the central purpose of ensuring that the small portions of their traditional territories represented by reserve lands remain in the hands of the First Nation and its members into the future. For the vast majority of First Nations today, this principle is seen not only as a necessary legal norm governing their relations with other people, it also reflects contemporary social norms and cultural values within their societies.

111 The vast majority of First Nations operate under the *Indian Act* land regime. This regime does not provide for, or allow, fee simple ownership of any portion of reserve lands by individual band members or by others. The lack of fee simple ownership flows from the general principle of the inalienability of reserve lands and the fact that it is the Crown, not the First Nation or individual First Nation members who holds the legal title to reserve lands. Under Canadian law, the collective interest of the First Nation is characterized as a unique interest similar to but not quite the same as a 'beneficial interest'. The purpose of this legal treatment of reserve lands is to create a system whereby no lands can be sold to a non-member without a valid prior surrender to the Crown of the parcel made by decision of the First Nation as a whole.

112 This central purpose of ensuring that reserve lands cannot be alienated to non-members through decisions of individual band members alone is reflected in several provisions of the *Indian Act* such as sections 18, 28 and 29:

> *18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.*
>
> *28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.*
>
> *29. Reserve lands are not subject to seizure under legal process.*

[26] Brian Ballantyne and James Dobbin, *Options for Land Registration and Survey Systems On Aboriginal Lands In Canada*, A Report prepared for Legal Surveys Division of Geomatics Canada, January 2000 at p. 2.10.

113 Ensuring the general inalienability of reserve lands is one of the key reasons exclusive legislative authority over 'Indians, and lands reserved for the Indians' was assigned to the federal Parliament pursuant to s. 91(24) of the *Constitution Act, 1867* rather than provincial legislatures. In addition to sections 18, 28 and 29, the following provisions of the *Indian Act* speak to the collective interest of each First Nation in its reserve lands: 2 (1) in the definitions of "band" and "reserve", sections 2(2), 16(2), 25(1), 25(2), 30, 31, 35, 36, 37, 38, 39, 46, 58, 81 (1) (i), (p), (p.1) (p.2). See Appendix D for a list of relevant *Indian Act* provisions.

114 In *Queen* v. *Devereux*, the Supreme Court of Canada described the central function of the Act as follows: "*The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s.28(1) of the Act."*

115 Even in decisions to make allotments of reserve land to individuals in accordance with the *Indian Act*, First Nation governments have been held not only to a common law duty of fairness but have been found to hold a fiduciary duty to all band members (citizens) to consider the rights of other band members. For example, in *Lower Nicola Indian Band v Trans Canada Displays Ltd.*, the Federal Court said that this fiduciary duty of First Nations in making decisions about individual land allotments "*requires a balancing of the individual's request for the allotment, including the purpose for which the allotment would be used, with the best use the land could be put to for the band community*".[27]

116 Another example of this principle is provided in s. 46(1) of the *Indian Act*, concerning wills, that states: "*The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that…(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act.*"

117 A second important legal principle is the interest First Nations have in their reserve lands is the same or equivalent to 'Indian title'. In *Guerin*[28] the Court stated: "*It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401, at pp. 410-11 (the Star Chrome case).*" The Court went on to say the First Nations' interest is their reserve lands is a "*pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision*".

118 In *Delgamuukw*[29], the Court described several key dimensions of aboriginal title that make it unique and distinguishable from 'normal' property interests:

1) It can only be understood by reference to both common law and aboriginal perspectives;
2) Inalienability is one of its key dimensions, that lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown, and as a result, is inalienable to third parties;
3) Indian title arises from First Nations' historic occupation and possession of their tribal lands, it arises from possession before the assertion of British sovereignty, whereas estates like fee simple arise afterward;
4) Aboriginal title is held communally and cannot be held by individual First Nation people;
5) Decisions with respect to the land are made by the community.

119 The Court in *Delgamuukw* also elaborated on the significance of the principle of inalienability as follows (at paragraph 129):

"I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore,

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[27] *Lower Nicola Band* v. *Trans-Canada Displays Ltd.* [2000] 4 C.N.L.R.185 (B.C.S.C.); See also *Campbell* v. *Elliott et al.,* [1988] 4 C.N.L.R. 45 (F.C.T.D.).

[28] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (SCC).

[29] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 (SCC).

cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements": see Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it."

120 Accordingly, when individual First Nation members acquire rights to occupy and use portions of reserve land, it is within, and ultimately subject to, the larger and unique legal characteristics of the collective 'Indian title' interest of the First Nation interest in reserve lands – including components that cannot be valued in monetary terms. Nevertheless, individual band members can acquire rights to use and occupy parcels of reserve land in various ways, some sanctioned by the *Indian Act*, and some not. Accordingly, the legal status and security of these individual interests in reserve land in the legal system as it now stands can also vary.

121 It is often said that an allotment of reserve land under section 20 grants a right of possession that is similar in many respects to fee simple ownership, in that the issuing of a Certificate of Possession (CP) provides an individual member a wide latitude vis a vis the First Nation in the use and occupation of an allotment. (certificates of possession, custom allotments and other forms of landholding and housing arrangements on reserves are discussed in the next chapter of this report.) A member can sell or transfer within the First Nation membership or lease the allotment to others. However, even the power to transfer or sell is subject to approval by the Minister (section 24 of the *Indian Act*), or his/her delegate which can be the First Nation under sections 53 and 60 of the *Indian Act*. In the end, an interest in reserve land held by CP is not equivalent to any other type of land ownership under Canadian law.

122 Faced with the complexities of domestic and world economic changes, First Nation governments have many complex decisions to make about how their lands should be used and managed to ensure their collective well-being. Among such decisions is what the legal regime applying to their reserve lands should look like. The vast majority of First Nations today continue to view the path to their collective security as lying in the preservation of their collective interest in the land. In this view, introducing unrestricted alienability controlled by individuals would lead ultimately to the break-up of reserves, the loss of distinctive cultures and would end the distinct political existence of First Nations.

123 On the other hand, there are some First Nations eager to experiment with new forms of landholding and land regimes that would allow individual interests in reserve land to be more market-based as a means of promoting individual and collective well-being and wealth.

124 The collective interest First Nations have in their lands means they are entitled to decide how their land should be used and managed to promote the long-term security of the entire nation now and in the future.

125 Some of the choices available can be seen in the range of self-government outcomes where First Nations have negotiated their way out of the *Indian Act* regime. Some self-government agreements have created systems where lands are held by the nation and can be held by individual members in fee simple (Sechelt). Other agreements provide that individual First Nation interests can be registered in the provincial land registry system (Nisga'a). Still others have maintained the status of their reserves under s. 91(24) as lands reserved for the Indians and continue to operate with a mix of certificates of possession or certificate of possession-like instruments, custom allotments and housing on general band lands (Westbank First Nation).

126 Some 48 First Nations have opted out of the land regime provisions of the *Indian Act* by entering an agreement with Canada to have the *First Nations Land Management Act* apply. Fifty-one additional First Nations are waiting to enter the FNLMA initiative. Under this regime, the First Nations concerned can determine how to operate or reconstruct the legal rules for individual interests in their

reserve lands by adopting a land code. Within 12 months of the land code taking effect, a First Nation operating under FNLMA is required to enact a law respecting matrimonial real property.

127 The FNLMA and its companion Framework Agreement is an opt-in legislative model that requires at least three key steps before a First Nation is removed from the *Indian Act* land management regime:

1) Canada and an interested First Nation negotiating an individual agreement;
2) Adopting a land code; and
3) The land code coming into force (council determines this date in its land code).

These three steps can take several years and until they happen, the *Indian Act* land management regime continues to apply to the First Nation.

Likewise, until these three events happen, the obligation to develop a code respecting matrimonial real property "upon breakdown of marriage" does not begin. Section 17 requires a First Nation to develop matrimonial real property rules following a community consultation process. This means the *Indian Act* gap continues until First Nation matrimonial real property rules are ratified by the community, and the obligation to adopt a matrimonial real property code is prompted by the coming into force of the land code. Section 17 provides:

> *17 (1) "A first nation shall in accordance with the Framework Agreement and following the community consultation process provided in its land code, establish general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land.*
>
> *(2) "The first nation shall within twelve months after its land code comes into force, incorporate the general rules and procedures into its land code or enact a first nation law containing the rules and procedures."*

128 At present, of the 48 First Nations participating in FNLMA:

- 18 have adopted land codes;
- 30 are in the process of developing their land code;
- 10 have adopted a matrimonial real property law;
- 2 are within the one-year period for developing a matrimonial real property law; and
- 6 are beyond the one-year period required for developing a matrimonial real property law (see Appendix E).

129 First Nations still operating under the *Indian Act* land regime are developing and experimenting with new approaches to housing, land management and individual land interests. Lac La Ronge Indian Band (LLRIB) for example uses a custom allotment system and has developed a program to finance the construction of new homes and for members to purchase existing band rental units. The First Nation has developed their own system of lease documents and policies for this purpose. A policy provides band members an opportunity to apply for a new residential lease that is a means of home ownership within the collective. These leases have a fixed 29-year-term and grant the lessees temporary rights of ownership of the land. In the course of developing their housing policy through community input, Lac La Ronge examined the CP system and determined that it was too restrictive, as the First Nation loses the ability to change or adapt the use of the land over time.[30] Lac La Ronge Indian Band also established new financing arrangements with the Bank of Montreal and Indian Affairs that enables the Band to guarantee housing loans to members and provide a revolving loan fund to assist members with a split-financing arrangement. The basic elements of the lease include a provision relating to non-members spouses described as follows in the policy document: *"v) Non-member spouses must sign a declaration of non-interest in the property before the lease will be granted. In cases where the member spouse dies, the non-member spouse may either sell the home or hold it in trust if the marriage produced children who are band members. If the home does not sell*

[30] Lac La Ronge Indian Band No. 353 On-reserve Home Ownership Program Overview, Presented to Indian and Northern Affairs Canada April 12, 2006.

within six months, the band agrees to purchase the home and may rent it or continue to keep the home for sale with the goal of finding another band member to purchase the home."

130 There is a great diversity and uniqueness of individual interests held by individuals on reserves subject to the *Indian Act* as the next section of this report shows.

Uniqueness and Diversity of Individual Interests in Reserve Lands

131 From legal, financial, social and cultural perspectives, landholding and housing arrangements on reserves are diverse and very different and in many ways that have no parallel off reserves. The Auditor General[31] and many court decisions, have taken note of these distinctions (see Appendix F).

132 While the *Indian Act* does not allow individual fee simple ownership of portions of reserve land, the Act does provide for individual rights of use and occupation by individuals of parcels of reserve lands. The Act provides a process for recognizing lawful possession by an individual First Nation member that can be evidenced by the issuance of a Certificate of Possession. For various reasons, many First Nation people live in homes located on reserve land that has not been allotted by Certificate of Possession.

133 One of the many anomalies in the current situation respecting matrimonial real property on reserves is the distinction between what the *Indian Act* says should happen, and what actually happens in regard to landholding on reserves. The *Indian Act* taken by itself suggests the only way land is held or can be held on reserve by individuals is by Certificate of Possession (CP). However this does not reflect the social, legal and political reality of how First Nations deal with land and housing issues on their reserves. In fact, the use of the allotment provision of the *Indian Act* by any First Nation is now treated as optional as a matter of policy. Indian and Northern Affairs Canada estimates that about 50% of First Nations use the *Indian Act* land allotment system. Many First Nations, particularly Treaty First Nations in the prairies, have quite purposely refused to use this system for a variety of reasons. For these First Nations, the *Indian Act* CP system represents a failed attempt to impose or to persuade First Nations to use rules respecting individual interests in reserve lands as determined by outside governments.[32] Other reasons for using procedures for allotting reserve land outside the *Indian Act* may be financial. INAC now requires that land be surveyed before a CP can be issued and no longer pays for these surveys. Consequently, many First Nations may opt for a custom allotment system in order to make an allotment to a First Nation member without imposing the burden on the individual of paying for a survey, or having the cost for a survey taken out of band funds.

134 Another consideration in the development of any matrimonial real property law is there appears to be in most, if not all First Nation communities, a broad set of policies, rules, customs, and legal traditions that operate outside the recognition of the *Indian Act* but which are understood by community members as applying to individual, family and clan interests in reserve lands. There is generally no system for registering what are known as custom allotments, apart from a record of their existence that may be evident in a band council resolution recording the First Nation's decision. Custom allotments are not registrable in the Indian Land Registry maintained by INAC because the *Indian Act* does not recognize them as "lawful possession".

135 Any practical and helpful response to matrimonial real property issues on reserves will require factoring in the various ways individual members of First Nations occupy homes on reserve lands within and outside the provisions of the *Indian Act*. There is considerable diversity in these situations and diversity in the degree to which they manifest themselves on different reserves.

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[31] Report of the Auditor General of Canada, April 2003, Chapter 6, Exhibit 6.1.

[32] Cornet Consulting & Mediation Inc. (Wendy Cornet and Allison Lendor), *Discussion Paper: Matrimonial Real Property on Reserve*, November 28, 2002; 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; Brian Ballantyne and James Dobbin, *Options for Land Registration and Survey Systems On Aboriginal Lands In Canada*, A Report prepared for Legal Surveys Division of Geomatics Canada, January 2000.

136 To date, most of the available literature discussing individual rights to occupy reserve lands has focused on two main situations – land held by certificates of possession issued and land held by 'custom allotment'. From an *Indian Act* perspective, these respectively fall into two general categories of interests – "lawful possession" and "unlawful possession". While the legal treatment of Certificate of Possession-held land and custom allotments is a key policy issue, there are many more landholding and housing situations to take account of, beyond these two main categories. There are historical practices such as Cardex Holdings that have produced interests that are still registered in the Indian Land Registry. In addition, there are the new legal instruments being created by First Nations to encourage private home "ownership" while preserving the collective interest (e.g. Lac La Ronge First Nation, Little Pine River First Nation and Mohawks of the Bay of Quinte).

137 The Tables below describe a range of individual interests in reserve land (meaning different ways in which First Nation members occupy or use reserve land or homes on reserve land) that may be relevant to matrimonial real property interests on reserves during marriage and upon marriage breakdown. In moving forward with any legislative proposals for specific rights and remedies, consideration will need to given to how these might affect the living and social situation of the families living in each of these situations.

Table 1: Individual Interests in Reserve Lands of Band Members Recognized by the *Indian Act*

1) *Allotment held by Certificate of Possession (CP)*
   - An allotment of land approved by band council and by the Minister of Indian Affairs as evidenced by issuance of a Certificate of Possession;
   - Provides a recognized individual right to use and occupy a portion of reserve land (surveyed) for an indefinite period of time;
   - An allotment by CP cannot be rescinded unless there has been a major defect in the allotment process such as fraud or an incorrect description;
   - Allotment held by CP is considered 'lawful possession' within the meaning of the *Indian Act;*
   - An allotment is created by way of a band council resolution (BCR), and Ministerial approval;
   - An approved allotment is subsequently registered in the Indian Lands Registry (ILR) and the ILR issues a CP as evidence of lawful possession;
   - Lawful possession of the lands is considered transferred once the Minister (or Minister's delegate) has approved an allotment;
   - Departmental policy (*Land Management Manual*, Chapter 3, p.4) sets out the required elements for a BCR to provide First Nation approval of an allotment, e.g. a majority of the council's vote and quorum is required;
   - A CP may be transferred to another band member (by gift or sale) in accordance with s. 24 of the *Indian Act;*
   - A CP may be willed to a person entitled to reside on the reserve in question pursuant to *Indian Act;*
   - Where person dies without a will, the value of entire estate inclusive of value of CP may be passed on by intestacy under *Indian Act*;
   - May be held by an individual alone or with one or more other First Nation members in joint tenancy or tenancy-in-common.

2) *Certificate of Occupation*
   - Provides a temporary right to occupy reserve land up to two years to the certificate holder or those claiming through the individual by devise or descent;
   - Identifies a term of occupation;
   - Issued when Minister withholds approval of a land allotment approved by council usually until specified conditions are met (such as obtaining a survey);
   - Can be extended for another period not exceeding two years;

- Once conditions are fulfilled, the locatee can submit the allotment for approval by the Minister and receive a CP;
- The Department maintains that temporary possession is not "lawful possession" within the meaning of s. 20(1) of the Act; as a result, the First Nation member cannot transfer or dispose of the lands except by devise or descent and heirs must fulfill the stated conditions to be eligible for lawful possession (See 4.6 of Directive 3-3 of Land Management Manual).

3) *Cardex Holding*
   - A historical individual interest in reserve land created by BCR and approved by the Minister under s. 20(1) of the *Indian Act;*
   - The INAC *Land Management Manual* states that land descriptions associated with Cardex holdings were vague and often inaccurate and that while most of the interests known as Cardex holdings are registered in the Indian Land Registry a proper survey must be done before any further transactions can take place on the particular parcel of land;
   - Considered "lawful possession" under the *Indian Act.*

4) *Notice of Entitlement (NE)*
   - An interest similar to a Cardex holding and typically unsurveyed;
   - An interest where an allotment has been approved by the Minister but no title has been issued;
   - Considered "lawful possession".

5) *No Evidence of Title Issued (NETI)*
   - Lawful possession approved by Minister but no title document issued;
   - Usually unsurveyed.

6) *Location Tickets*
   - A document previously issued under older versions of the *Indian Act*, as evidence of a person's lawful possession of reserve lands;
   - Is synonymous with CPs as defined under the *Indian Act.*

7) *Section 22 Interest (Lands held by a Member prior to Creation of a Reserve)*
   - By virtue of section 22 of the *Indian Act*, lawful possession of reserve lands may arise where a First Nation member was in possession of lands at the time that the lands were included in the reserve, and he or she had made improvements on that land

8) *Individual Member Interest in Designated Lands*
   - Where a First Nation has conditionally surrendered a part of their reserve lands for economic development purposes such as housing development members as well as non-members may acquire individual interests in such lands;
   - Section 20 CP allotment procedure cannot be applied to designated lands.

Table 2: Individual Interests in General Band Lands

9) *Custom Allotment amounting to Lawful Possession under the Indian Act*
   - "Custom allotment" where approval of band council is evidenced by a BCR, and there is also subsequent implied approval by Minister, e.g. by providing a Ministerial Loan Guarantee (MLG) but no CP issued;
   - May amount to lawful possession despite lack of CP because certain actions of Minister/Department indicate approval (see *George* v. *George*, BCCA).

10) Custom Allotments Registered in Indian Lands Registry

- For a period during the 1970's the Department put in place a policy to allow the recording of 'custom allotments' in the Indian Lands Registry;
- In the 1970's, INAC found the practice of this type of allotment to be of some value to First Nations and put in place a policy to accommodate the recording of such interests in the Indian Lands Registry;
- Through this policy, INAC issued a License of Occupation for a custom allotment while maintaining that it was for administrative expediency only and was not to be considered lawful possession;
- Under current federal policy, these allotments are not considered lawful possession under the *Indian Act*. As such they are not administered by INAC and are no longer registered in the Indian Lands Registry but previously registered allotments remain recorded.

11) Custom Allotment not amounting to Lawful Possession under the Indian Act

- "Custom allotment" where approval of band council is evidenced somehow, perhaps by a BCR, but there is no approval by Minister express or implied;
- Department's understanding of this type of custom allotment is described as follows in the *Land Management Manual*, Chapter 3: "*Certain First Nations do not subscribe to the allotment provisions of the Indian Act. Instead, these First Nations recognize traditional or customary holdings by individuals and grant 'occupational rights at the pleasure of the First Nation council'. The department does not administer these interests, which are not lawful possession under the Indian Act, and therefore, these holdings are not registered in the ILR. The holders of these interests have no legal rights and remain on the property at the pleasure of the First Nation council*."

12) Individually 'Owned' Home Located on General Band Lands

- Lands that have not been allotted to an individual by CP are considered to be "band lands";
- On some reserves, homes are built on general band lands at the individual's own expense and by making their own financing arrangements with a bank;
- This may occur without even a custom allotment taking place.

13) Rental of Band-Owned Housing with no Lease-to-Purchase Arrangement in Place

- Housing owned by the band is often referred to as "social housing"
- Many First Nation people live in homes owned and assigned to them by the band council under a contract requiring them to pay rent, often geared to monthly income (typically through the section 95 CHMC Non-Profit Rental Program).

14) Rent-to-Own Band-Owned Housing with Pledging of a CP

- Housing where the band and a band member enter a contract under which the member agrees to pay off (over a certain specified period of years) the mortgage acquired by the band to build the house;
- In cases where a CP has been issued in relation to the land on which the home is located, the band member will "pledge" the CP to the band, the band will hold the individual's CP until the mortgage is fully paid off;
- The pledging of the CP would be entered in the ILR;
- When the mortgage is paid off, the CP inclusive of the home built on the land is returned to the individual, who now "owns" their home;
- If the full mortgage is not paid off because of default for example, the band member forfeits the CP and the right to use and occupy the land and the home and is not considered to have any equity in the home.

15) Rent-to-Own Band-Owned Housing with Pledging of Written Consent to Occupy other than by CP

- This is similar to the situation above but where a band-owned home has been built on an allotment held by custom allotment, the band member may pledge a "written consent", to forfeit their right to use and occupy the land and the home in the event of default;
- The pledging of a written consent in relation to a custom allotment is not registered in the ILR.

138 Understanding the limitations of the Indian Land Registry to assist in accurately identifying interests relevant to matrimonial real property is another issue. In this regard, I draw your attention to the following comments by Dr. Brian Ballantyne and James Dobbin:

"*The system does not require registration in order for title to transfer. For example, an individual First Nation member may be allotted an exclusive right to use and occupy a portion of a reserve. The Indian Act requires that such a right be granted by the First Nation council and confirmed by the Minister. The appropriate documents may then be forwarded to the Indian Lands Registry for registration, but that step is apparently not necessary under the legislation for the interest to vest in the member. Similarly, a member may transfer his or her allotment to another member, again, with the approval of the Minister. Again, registration is apparently not required for the interest to vest in the new holder of the rights. There is no legislated system of priority for registered allotments over unregistered ones and a very weak scheme of priorities for assignment of leases of designated lands. As a result, the system cannot conclusively answer the crucial question of who holds what rights in any specific parcel….The system will not guarantee that the individual named in [a Certificate of Possession] is in fact, the true holder of those rights. It will also not provide confirmation as to the status of the title to any particular parcel of reserve land as a registration of titles system would do.*

It can thus be seen that the system functions neither as a registration of deeds system nor as a registration of titles system."[33]

139 Overall, the existing rules that apply to individual landholding and home ownership and occupation on reserves are a combination of laws and policies made by the federal government and by First Nations as well as First Nations cultural norms and customary practices. The result is the creation of a number of interests in homes and land on reserves, some of which are recognized by the *Indian Act*, and entered in the Indian Lands Registry and some of which are not. Quite clearly neither the *Indian Act* nor the Indian Land Registry reflects all of the interests and transactions that First Nation people and First Nation governments recognize and engage in. This is a difficult and complex environment in which to apply a new federal matrimonial real property law.

[33] Brian Ballantyne and James Dobbin, *Options for Land Registration and Survey Systems On Aboriginal Lands In Canada*, A Report prepared for Legal Surveys Division of Geomatics Canada, January 2000 at pp. 2.10-2.11.

V. Consultation Issues

140 My mandate requires providing advice to you on a "viable legislative solution for addressing the issue of matrimonial real property". In this regard, one of the specific objectives stated in my mandate is: "To ensure appropriate consultations on the issue of MRP, including conformity to *Haida* case law principles and concerns with the consultation process and how best to facilitate a process that includes the AFN, NWAC and INAC". My mandate also requires that in the event no consensus was reached by the parties, to recommend a solution which will conform to human rights considerations, abide by basic principles set out in *Haida* case law and be in harmony with provincial/territorial legislation (as required).

141 As you are no doubt aware, *Haida* is a 2004 decision of the Supreme Court of Canada in which the Court reviewed and summarized the existing body of law concerning how to determine when a legal duty to consult may arise and its content, while also breaking new ground in providing guidelines for determining when a legal duty to consult may arise where a claim of aboriginal right or title has not yet been proven in court. In this latter regard, the Court held that:

1) The duty arises whenever the Crown knows of the potential existence of an Aboriginal right or title, and is considering conduct that might adversely affect it.
2) In such cases, governments must do what is necessary to maintain the honour of the Crown and achieve reconciliation with respect to the interests at stake. This will require balancing societal and Aboriginal interests when making decisions affecting Aboriginal claims.
3) This duty may require government to change its plans or policies in order to accommodate Aboriginal concerns, if consultation shows that to be necessary.[34]

142 At the outset to this process, the government said it was not clear if there was a legal duty to consult. At other times, the government has said there is no legal duty to consult in the matter of matrimonial real property on reserves, and that it was consulting based on considerations of good governance and public policy. The government clearly feels compelled to act on a long neglected human rights issue, particularly in the face of mounting concern in Canada and internationally.

143 Serious issues about consultation of a legal and policy nature nevertheless arose throughout the consultation and consensus-seeking phase. Some of the policy issues arise independent of the existence of any legal duty to consult, for several reasons including the government's stated commitment to abide by *Haida* principles, my mandate to try to accommodate concerns with the consultation process and the general need for the Department to have an official policy on consultation.

144 Serious concerns were raised throughout all three phases of the process by national organizations, regional and tribal bodies, First Nation councils and other First Nations representatives and First Nation women organizations.

145 In the AFN dialogue sessions, the view most commonly expressed was that the tight timeline provided for consultations unnecessarily restricted the depth of analysis and community level consultation that was required for the complexity of this subject matter and its potential impact on aboriginal and treaty rights. First Nation representatives in every region that participated expressed the view that the short timeline for a national consultation process, at best constrained, and at worst prevented, the ability of First Nation representatives to consult directly or meaningfully with their community members prior to attending the dialogue sessions. There was only one dialogue session held per region by the AFN and it appears the Ontario region chose not to hold one at all. Many representatives said they were not in a position to comment on the government proposals with views representative of their respective communities for the one regional meeting called. The status of the AFN dialogue sessions as consultation were questioned in part due to the mandate of INAC representatives attending these meetings who could not engage in substantive exchange of views

[34] *Haida Nation* v. *British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 (SCC).

with First Nation representatives. (However, there also were portions of these meetings that were held in camera and INAC representatives were excluded.)

146 These concerns, combined with the fact that the Crown's duty to consult cannot be delegated to any other entity (*Taku River First Nation*),[35] appeared to have led to the AFN characterizing the AFN sessions as 'dialogue' rather than consultation sessions. In a letter dated 1 December 2006 to yourself as Minister, National Chief Fontaine stated: *"We wish to unequivocally state that the Assembly of First Nations (AFN) is not engaged in consultations with First Nations on behalf of the Crown. This would be contrary to the law, as the Supreme Court of Canada has clearly stated that the Crown cannot delegate its duty to consult to third parties."*

147 In addition to concerns about the tight timelines, First Nations point to decisions such as the recent Supreme Court of Canada decision in *Mikisew*[36] (Treaty 8) and the Federal Court decision in *Dene Tha*[37] to say there is a legal requirement for direct consultation between the Crown and individual Treaty Nations.

148 At times during the process, the Native Women's Association of Canada also said it had significant concerns about its ability to conduct consultation sessions within the timeframe and raised questions about whether Canada was attempting to delegate its consultation duties.

149 In the Executive Summary of the report entitled, "Reclaiming Our Way of Being: Matrimonial Real Property Solutions Position Paper", NWAC expressed satisfaction and appreciation in having the opportunity provided by the consultation process - after waiting over 20 years to work with the federal government and the AFN towards a solution on matrimonial real property.

150 Nevertheless, NWAC did report they encountered impediments that constrained the activities undertaken as part of the initiative: the short timeframe for the consultation process, logistical pressures arising from the short timeframe, safety and security concerns and women's general lack of knowledge about matrimonial real property (at pages 31-32).

151 NWAC states at page 33 of their final report: "*there were very serious concerns raised by the participants regarding the short time frame for consultations and the turn around for this consultation process. As noted in our submissions in previous Standing Committees, NWAC needed a full year for these consultations. In this process, we were given three months. Many participants were skeptical of this process because they did view it as government driven but delivered by Aboriginal organizations. Based on the way the phases were developed, with only three months of consultation, they were justified in their skepticism*."

152 Representatives of First Nation governments insisted that the discussions facilitated by the Assembly of First Nations as "dialogue sessions" did not constitute consultations for many reasons including those listed above. Despite these problems, significant contributions were made by the First Nation people who participated in regard to the substantive issues, including comments, observations and questions about the three legislative options proposed by the federal government.

153 Overall in my view, the expression of concerns about the depth of consultation and next steps, raise serious legal and policy considerations for the government to consider. As is so often the case involving aboriginal and treaty rights issues, issues of substance and process are intimately connected. This is certainly the case respecting the challenge of developing a legislative option to address matrimonial real property that meets both human rights and aboriginal and treaty rights requirements.

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[35] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* [2004] S.C.J. No. 69 (SCC).
[36] *Misikew Cree First Nation* v. *Canada (Minister of Heritage*) [2006] 1 C.N.L.R. 78(SCC).
[37] *Dene Tha' First Nation v. Minister of* Environment [2006] F.C.J. No.1677(F.C.T.D.).

154 In regard to federal Options 1 and 2 (as described in INAC consultation documents) it became very clear, very early in the process that any option involving the incorporation of provincial laws of general application respecting matrimonial real property matters was considered unacceptable for a number of reasons. Some relate to aboriginal and treaty rights. Others of equal magnitude relate to the impracticability of applying provincial laws to a distinctly different land regime and social situations for which those laws were not designed. These concerns have been supported by the conclusions of two independent legal analyses prepared for my consideration – one by Danalyn MacKinnon in relation to common law jurisdictions and the other by Diane Soroka in relation to civil law considerations. These conclusions can be summarized as follows:

1) The application of provincial law relating to matrimonial real property subject to the provisions of the *Indian Act* in case of inconsistency or conflict will:
   - result in numerous situations in which the provincial law will not apply because of conflicts with the *Indian Act*. This will leave gaps in the applicable law and defeat much of the stated purpose for enacting the legislation;
   - result in unequal treatment of individuals with matrimonial real property on reserves from province to province;
   - result in unequal treatment between individuals with matrimonial real property on reserves and those with matrimonial real property off reserves within the same province;

2) Depending on the content, the enactment of substantive federal legislation on matrimonial real property could:
   - enhance the coherence of the law;
   - help ensure equality of treatment of individuals with matrimonial real property on reserves.

155 An additional piece of research focusing on possible rights and remedies was prepared by Teressa Nahanee. All of this work has contributed to the body of information available to shape the search for solutions and is attached as Appendix G.

156 As you know, Options 2 and 3 would both involve some form of recognition of First Nations' jurisdiction by the federal Parliament. During the consultation and dialogue sessions held by the AFN and NWAC, First Nation representatives were not clear as to whether federal Option 3 was open to a recognition of inherent or pre-existing lawmaking powers rather than delegated powers. The message was equally clear on this point. Delegated powers would not be acceptable and First Nations are looking for a clear recognition of First Nations' jurisdiction. It became clear that a modified Option 3 or an alternative to it, are the only viable possibilities for a number of reasons.

157 Participants in the AFN and NWAC sessions responded to the opportunity for an exchange of views, and to narrow the options. However, the AFN participated with instructions to reorient this process so that it would better reflect the directions of the Chiefs-in-Assembly and Executive Resolutions.[38] Both organizations expressed great concern about the possibility of the process continuing without their direct involvement after the consensus-seeking phase.

158 In addition, they said there are inherent limitations in the capacity of First Nations, First Nation organizations and the federal Crown itself to assess the potential impact on aboriginal and treaty rights of the options put forward (particularly any variation of federal Option 3 or an alternative option). This affects the ability of the parties to fully assess and come to any agreement on whether there is a duty to consult as well as its scope and content. The descriptions of the options in the INAC consultation documents were not considered to provide (and could not provide at this point) sufficient detail to make such a thorough assessment possible. The descriptions were of course not detailed precisely because the government wished to consult with First Nations and First Nation women in order to further develop them.

[38] AFN Resolutions # 32/2006 and # 72/2006.

159 With respect to a duty to consult, I have received an independent legal analysis, carried out by subcontract on my behalf by Diane Soroka, dated March 6, 2007. This opinion does not constitute an opinion to the Crown. This analysis was requested in order that I may properly consider recommendations to you on how to address consultation concerns. The key conclusions of this legal analysis are summarized below:

1) There is a duty to consult First Nations in regard to the proposed legislation as a result of their collective interests in the reserve lands set aside for their use and benefit.
2) As the information to date has been relatively vague, particularly as concerns the possible content of federal legislation under Option #3, further consultation will be required on the eventual contents of any proposed legislation.
3) If the legislation recognizes a right of First Nations to legislate on the subject, the impact will likely be seen as less negative than if there is no such recognition. In addition, the size of the reserve land base and the uses to which it can be put are not changed. Depending on the contents of the eventual legislation, there may be little negative impact on the First Nation's collective interest in the lands. The nature and scope of the duty to consult may then be at the lower end of the scale.
4) Even at its most minimal, the duty to consult requires direct engagement with each First Nation. This cannot be delegated to a third party.

160 Several First Nations have sent letters and resolutions asserting a legal duty to consult exists and that it has yet to be discharged at a nation level.[39] I cannot of course make proclamations about whether or not there is a duty to consult in this matter or what its content is. Consistent with my mandate, I make recommendations in Chapter 7 on how to address these consultation issues while maintaining the government's commitment to introduce legislation respecting matrimonial real property in spring of 2007.

Process Issues Following Submission of Report

161 There has been considerable concern and a lot of questions about what happens once a decision identifying a specific legislative option has been made following my report to you.

162 Almost all the provincial and territorial governments consulted by INAC stated that they want to be consulted further, once a legislative solution is identified.

163 Both the Assembly of First Nations and Native Women's Association of Canada say that their views must be canvassed throughout the development of a specific legislative proposal, and especially once the government had settled on one approach. This issue was raised early in the planning phase, and continued to be raised throughout the consultation and consensus-seeking phases. INAC representatives have not been in a position to make any commitments about sharing of actual drafts of any proposed legislation, citing policies respecting Cabinet confidences. In response, both organizations suggested that there was both potential and precedent for flexibility in this area; from past protocols such as the sharing legislative drafting in the development of implementing and ratifying legislation for self-government and comprehensive claims agreements. There are is also a national precedent - the process leading to the development of the proposed First Nations Governance Act in 2000-2001 provided opportunities for First Nation organizations involved in providing advice to the then Minister prior to Cabinet decision-making on drafting instructions, to review drafts of the legislation (with Cabinet approval).

[39] See for example: Assembly of First Nations Resolutions no. 32/2006 and 72/2006; November 15, 2006 Resolution of Anishinabek Nation Chiefs-in-Assembly (06/88); November 24, 2006 Letter to Ministerial Representative from Grand Chief Stonefish of Association of Iroquois and Allied Indians; December 1, 2006 letter to Minister Prentice from AFN National Chief; January 8, 2007 submission from Blood Tribe / Kainai to Minister Prentice and Ministerial Representative on Matrimonial Real Property on Reserves; February 14, 2007 Consensus Statement of AFN First Nation Women Leaders; March 2, 2007 Letter to Ministerial Representative from the Mohawks of the Bay of Quinte.

164 On the issue of sharing drafts of proposed legislation with the organizations, it is important to consider the legal and policy context for government discretion to accommodate these requests. As you are no doubt aware, Confidences of the Queen's Privy Council for Canada, commonly referred to as 'Cabinet confidences', are safeguarded from unauthorized disclosure or other compromise. The Cabinet's collective decision-making process had traditionally been protected by the rule of confidentiality, which is said to enhance Cabinet solidarity and collective ministerial responsibility. Confidentiality is also rationalized as a means of ensuring that Ministers can frankly express their views before a final decision is made.

165 At least four federal statutes are relevant in understanding the obligations of Ministers and officials in regard to both public access and safeguarding the confidentiality of information falling in different categories of government: the *Security of Information Act*, the *Evidence Act*, the *Access to Information Act* and the *Privacy Act.* Various policy guidelines have been issued to guide officials in abiding by the requirements of the legal requirements of these acts. In addition to mandatory requirements for either sharing or safeguarding of government information, there are areas of discretion affecting the release of government information including Cabinet confidences.

166 The *Access to Information Act* provides a right of access to general government information and is said to be quasi-constitutional in that it overrides provisions in other federal laws, except those listed in Schedule II of the Act. In order to preserve the traditional rule of Cabinet confidentiality, subsection 69(1) of the Act provides that the Act does not apply to "confidences of the Queen's Privy Council for Canada", also commonly called Cabinet confidences. The Act provides a non-exhaustive list of specific types of records that are deemed to be confidences of the Queen's Privy Council for Canada and are excluded from the application of the Act. Included in this list among other types of records is draft legislation:

1) Memoranda to Cabinet (records presenting proposals or recommendations to Cabinet, including drafts of memoranda and those in final form);
2) Discussion papers (records presenting background and analysis of problems or policy options for consideration by Cabinet);
3) Agenda and Records of Cabinet Deliberations;
4) Records of Communications between Ministers;
5) Records to Brief Ministers;
6) Draft legislation (includes any drafts of legislation whether or not it is ever introduced in Parliament as well as draft regulations and Orders in Council); and
7) Records containing Information about Confidences.

167 The 2000-2001 Annual Report of the Office of the Information Commissioner notes that Cabinet confidences may be disclosed with the consent of Cabinet. In particular, the Information Commissioner's report says there is a convention that the Prime Minister and former prime ministers control access to the Cabinet confidences of his or her administration. Further, the Information Commissioners states that current federal policy provides discretion to the Cabinet or the Prime Minister to make a Cabinet confidence accessible to the public.

168 It should be noted that the section 35 rights of Aboriginal peoples and the fiduciary obligations of the Crown in respect of those rights may require a special treatment of confidentiality in an aboriginal policy or legal context.

169 As the 2002 Report of the Access to Information Review Task Force[40] notes, aboriginal peoples may have rights of access to records that change the operation of the *Access to Information Act,* in order to accommodate their rights and needs. The Task Force observed that the *Samson Indian Band* case[41] demonstrates that, in some situations where the Crown acts as trustee of Indian land or resources it can be required to disclose information in the litigation context that would otherwise be protected from disclosure. In that case, the Court rejected the Samson First Nation argument that a

[40] At http://www.atirtf-geai.gc.ca/paper-aboriginal2-e.html (Report 21- Access to Information Review Task Force).
[41] *Samson Indian Band and Nation* v. *Canada* [1998] 2 F.C. 60 (C.A.).

broad general right of disclosure existed flowing from the fiduciary duty. However, the Federal Court of Appeal, did on the facts in that case uphold the lower court's finding that there was a narrower duty to disclose a legal opinion in certain circumstances where the federal government was managing First Nation lands and other assets. The implications of this case for consultations generally and with respect to ongoing discussions and analysis concerning matrimonial real property should be considered from a legal and policy viewpoint.

170 There are discretionary exemptions under the Act, that also may affect First Nations interests with respect to rights and title, as noted by the Report of the Access to Information Review Task Force – section 21 (advice or recommendations to government), section 23 (solicitor and client privilege) and section 14 (injurious to federal-provincial affairs). The Task Force suggested there was a need for additional guidelines to assist in the exercise of discretion under the *Access to Information Act* as it affects Aboriginal peoples and quoted the decision of the Supreme Court of Canada in *R*. v. *Adams*[42] regarding Parliament's obligations in crafting legislation; that Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. Respecting the discretionary exemptions under the *Access to Information Act*, the Task Force Report specifically suggested that *"it may be appropriate to adopt a policy directive to the effect that where a request concerns rights that may receive constitutional protection, and there is uncertainty about the application of discretionary exemptions, that uncertainty should be resolved in favour of disclosure to aboriginal peoples*." The Task Force also made recommendations respecting the Act's mandatory exemptions and suggested one option would be to develop an alternative regime outside of the Act for Aboriginal peoples seeking to pursue their special legal entitlements.

171 Respecting the *Access to Information Act* and Cabinet Confidences, the Task Force stated: "*The Act currently provides no right of access to Cabinet confidences. We adopt the concerns expressed by others with respect to the appropriateness of this exclusion. In addition it must be recognized that this is a matter of particular importance to aboriginal people, who may have a right to such information insofar as it relates to any fiduciary obligations of the Crown. If the scope of the Act is extended to include Cabinet confidences, any exemption from disclosure for such documents should be subject to aboriginal peoples' interests to ensure that those documents relating to the fiduciary obligation can be disclosed. If the Act is not so extended, some other formal mechanism should be developed to address aboriginal peoples' concerns in this regard*."

172 Finally, there are several precedents where the federal government has exercised its discretion to share and consult on actual drafts of legislation, e.g. implementing legislation for land claims agreements, the *Sechelt Self-Government Act*, the *Cree-Naskapi (of Québec) Act*, and Ministerial Advisory Committee on the First Nations Government Initiative.

173 As Mr. Justice Blanchard noted in *Canada (Information Commissioner)* v. *Canada (Minister of the Environment)*[43], "*Being the master of the economy, Cabinet is free to use whatever Cabinet paper system it chooses and is equally at liberty to modify its paper system at will to fit the practical reality of the day*."

174 The outcome of the legislative process in terms of its potential impact on aboriginal and treaty rights, as well as whether and how the Crown engaged in meaningful prior consultation in a timely fashion are all matters that can be scrutinized by a Court where there is a legal duty to consult.

175 The viability of any MRP legislation is of course dependent on its conformity to any relevant constitutional requirements for its validity. These may include tests respecting what constitutes justifiable infringement of any relevant aboriginal and treaty rights, including consideration of whether there is a valid federal legislative objective and whether any legal duty to consult has been discharged. This latter requirement may apply whether or not the Crown is aware, or is of the opinion,

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42 *R*.v. *Adams*, [1996] 3 S.C.R. 101 (SCC).

43 2001 FCT 277 varied by the Federal Court of Appeal, 2003 FCA 68.

there is a legal duty at the time it is developing legislation. It is also worth noting on this latter point that in *Haida*, the Court said, "*Difficulties associated with absence of proof and definition of claims [to aboriginal and treaty rights] are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.*"(para 37)

176 Because of the Department of Justice's constraints relating to solicitor-client privilege, federal representatives felt they were unable to share with First Nation representatives or myself the rationale for concluding there was either no legal duty to consult or a lack of clarity on the issue. There are several policy and legal questions that arise from this situation.

177 First, because of the above described constraints relating to solicitor-client privilege, it is not clear whether Canada has considered that independent of any claims by individual First Nations respecting the assertion of an inherent right of self-government in relation to matrimonial real property issues, a duty to consult may arise from the fact that there is an aboriginal title interest for most, if not virtually every, reserve currently subject to the *Indian Act* land management regime.

178 The operational constraint of the current policy in relation to solicitor-client privilege in the context of the Crown's consultation activities hampered the ability to fully discuss all the issues and interest at stake. Consensus-seeking and reconciliation are processes that by definition require a sharing of views, interests, assumptions and understanding - not only on the specific subject-matter of consultation but also on the question of whether any given proposal to address matrimonial real property in this case raises issues respecting aboriginal and treaty rights and the duty to consult. It would likewise appear to be difficult to engage in any exercise of reconciliation, compromise and balance when one or more of the parties can only state legal conclusions but not the reasoning that led to those conclusions.

179 The Government of Canada does not yet have an official or public policy on how to operationalize the *Haida* principles yet INAC is committed to respect them. Regardless of whether there is a legal duty to consult on matrimonial real property, the Government of Canada has publicly committed itself to abide by the *Haida* principles.

180 The principles in *Haida* are intended to be a general guide for First Nation and Government parties – there may be different viewpoints on what this means for this specific situation, and this was clearly evident throughout the consultation process.

181 Based on the consultation concerns raised during the process, there are a number of questions that I suggest require some further consideration:

1) The question arises whether there is an obligation on the part of the Crown to attempt to resolve disputes relating to the existence of a duty to consult either through mediation or by resorting to the courts before continuing to pursue the action being questioned (See *Haida* and *Musqueam Indian Band* v. *Richmond*[44]).
2) Given that the Crown is considered to have constructive notice of section 35 treaties, does case law such as *Mikisew* and *Dene Tha* have implications for the current MRP consultation process? – for example, is there a right to direct consultation with such Treaty Nations? For your information, I attach a copy of an Alberta Treaty 8 Chiefs policy document respecting consultation (see Appendix H).
3) If the onus to initiate consultation is on the Crown and if First Nations have a duty to reciprocate, what is the appropriate course of action where a First Nation receives notice of a meeting, is willing to participate in consultation but for other reasons cannot attend? What is sufficient to meet the Crown's duties?
4) *Dene Tha* and other cases suggest that where there is a legal duty to consult with a First Nation, the government cannot avoid properly fulfilling a duty to consult by saying it was in a hurry or had a tight timeline – in this process we do not yet know how many First Nations

[44] *Musqueam Indian Band* v. *Richmond* 2005 B.C.S.C. 1069.

received notice of the AFN regional sessions for example, and how many were unable to attend.

The Need For a Federal Consultation Policy

182 The policy issues raised by consultation activities are necessarily broader than, but inclusive of, issues concerning the existence of any legal duty to consult and its content.

183 It is now 17 years since *Sparrow*[45], the first Supreme Court decision which articulated a principle of consultation as a part of a test for determining whether there has been an infringement of an aboriginal or treaty right that can be justified. Since that time, there have been at least 12 decisions including *Haida* that have addressed or referred to an issue of consultation.[46] Despite this critical mass of decisions, the federal government has yet to develop a consultation policy to assist departmental officials in designing and implementing consultation exercises. A process that began post-*Haida* for this purpose has not yet been completed.

184 Departmental officials charged with conducting the matrimonial real property consultation process were understandably in a difficult position - having to carry out a consultation process on a highly complex legal topic and simultaneously coping with complex policy issues concerning consultation without the benefit or guidance of an actual consultation policy. First Nation representatives and First Nation women were similarly disadvantaged in not knowing what the government's policy response is, to this mass of important case law that vitally concerns their fundamental rights. It was not surprising then that issues did arise in this process with major policy and legal implications. I recommend that efforts be made to address this large gap in federal policy as soon as possible. This includes developing a companion set of practices and procedures for monitoring, recording and assessing concerns about consultations made by First Nation representatives throughout the process.

185 The growing body of case law we now have provides much common sense and rich material for developing policy and practice respecting consultation activities or duties carried out by INAC. The Supreme Court in *Haida* spoke to the role a government consultation policy can play in achieving reconciliation (at paras 50 and 51):

186 *"Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.*

187 *It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in R. v. Adams, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers."*

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45 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075. (SCC).

46 *R. v. Sparrow,* [1990] 1 S.C.R. 1075; R. *v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Badger,* [1996] 1 SCR 771; *R v. Nikal,* [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010; *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203 (SCC); *R. v. Marshall [1999] 3 S.C.R. 533 (SCC).; Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

188 In addition to existing court decisions on consultation, there are several sources from which to draw guidance in developing such policy and procedure. In this regard, the Supreme Court in *Haida* took note of the New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) and quoted it as follows (at pp. 21 and 31):

"*Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . .*
genuine consultation means a process that involves . . .
gathering information to test policy proposals
putting forward proposals that are not yet finalised
seeking Mäori opinion on those proposals
informing Mäori of all relevant information upon which those proposals are based
not promoting but listening with an open mind to what Mäori have to say
being prepared to alter the original proposal
providing feedback both during the consultation process and after the decision-process."

189 In a 1989 resolution, the AFN Confederacy of Nations set out several principles the AFN feels should be reflected in government consultation policies and practices:

1) *That there be no pre-determined agenda. (The parties shall together fashion the agenda.)*
2) *That the parties comprise the federal and First Nations governments or their duly authorized representatives. (Government-to-government talks).*
3) *That the parties exchange information, views and comment as equals and conduct their business with mutual respect and in good faith.*
4) *That discussions be open and agreements be openly arrived at (i.e. there shall be no "selective" or private discussions).*
5) *That First Nations obtain and be given the fullest information to enable them to make sound and reasoned judgements.*
6) *That First Nations views be fully discussed and due weight accorded to them.*
7) *That every possible attempt be made to harmonise differing views among First Nations and the federal government aimed at positions that all sides can accept and implement.*
8) *That, where all sincere attempts at reaching consensus have failed, the dissenting views be appropriately recorded and respected; and no party shall unilaterally proceed against the interests of any other.*[47]

190 The resolution goes on to state that the AFN is not a national aboriginal government; that it cannot bind any First Nation beyond the extent to which that First Nation freely consents whether by opting for specific legislation or uniform legislative change or status quo. The AFN Resolution envisions three stages of consultation. In the initial stage, consultations will focus on information, education and explanation so that all First Nations might be as fully aware as possible of any initiatives and their implications. In the middle stage, consultations with fully informed First Nation leaders meet through the AFN and freely exchange informed opinions while arriving at consensus or agreeing to disagree on the various options. The final stage of consultations occurs when First Nations and the federal government discuss various options with the view to agreement on particular courses of action.

191 In the United States of America, Executive Order 13175 of November 6, 2000, is entitled "Consultation and Coordination with Indian Tribal Governments".[48] Its purpose is to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes. The Order sets out some fundamental principles in section 2 such as the government-to-government relationship, the right of Indian tribes to self-government and recognition of their inherent sovereign powers over their members and territory and their right to self-determination. Section 3

[47] AFN Confederacy of Nations Resolution No. 4/89, adopted on 18 October 1989.
[48] Government of the United States of America, Federal Register, Vol. 65, No. 218 at pp. 67249-67252.

then requires all federal agencies, in addition to adhering to the fundamental principles in section 2, to adhere to the following criteria when formulating polices that have tribal implications:

a) *Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.*
b) *With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.*
c) *When undertaking to formulate and implement policies that have tribal implications, agencies shall:*
    (1) *encourage Indian tribes to develop their own policies to achieve program objectives;*
    (2) *where possible, defer to Indian tribes to establish standards; and*
    (3) *in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.*

Section 4 provides special requirements respecting legislative proposals as follows: "*Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3*."

192 All of the concerns and lessons learned in this process relating to matrimonial real property provide an opportunity to move forward on the long neglected issues concerning consultation policy affecting Aboriginal matters.

VI. Summary of Solutions Proposed During the Process

193 One of the requirements of my mandate is to provide a summary of proposed solutions offered during the process.

Indian and Northern Affairs Canada

194 From the outset of its consultation process, INAC suggested three broad options for legislative action. INAC indicated its openness to consider other legislative options and was open to non-legislative options but not as a complete alternative to legislation.

195 The three federal legislative options were described as follows in the INAC's *On-Reserve Matrimonial Real Property Consultation Document*, of Fall 2006:

Option 1: Incorporation of provincial and territorial matrimonial real property laws on reserves

Under this option, federal legislation would be adopted to make provincial and territorial legal protections on matrimonial real property available on reserves. As changes are made to provincial and territorial laws relating to matrimonial real property, the same changes would apply on reserves. In order for this option to work, some changes to the *Indian Act* would need to be made.

> *Application of provincial law*
> X. (1) The law of the province in which a reserve is situated applies to the division and use, occupation or possession of matrimonial real property or immovables that are situated on the reserve.
>
> *Reserve situated in more than one province*
> (2) If a reserve is situated in more than one province, the law of the province in which the greater part of the reserve is situated applies.
>
> *Conflict between Acts*
> (3) In the event of an inconsistency or conflict between the provisions of this Act and provincial law, this Act prevails to the extent of the inconsistency or conflict.

Option 2: Incorporation of provincial and territorial matrimonial real property laws combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property

Similar to the first option, federal legislation would be adopted to make provincial and territorial legal protections on matrimonial real property available to First Nations individuals living on reserves. Therefore, the laws of the province or territory in which a reserve is located would provide a matrimonial real property regime unless and until a First Nation enacts its own matrimonial real property rules. As with the first option, some changes to the *Indian Act* would need to be made.

> *Application of provincial law*
> X. (1) The law of the province in which a reserve is situated applies to the division and use, occupation or possession of matrimonial real property or immovables that are situated on the reserve.
>
> *Reserve situated in more than one province*
> (2) If a reserve is situated in more than one province, the law of the province in which the greater part of the reserve is situated applies.

Conflict between Acts
(3) In the event of an inconsistency or conflict between the provisions of this Act and provincial law, this Act prevails to the extent of the inconsistency or conflict.

This option is different from the first because it would also change federal legislation so that First Nations could exercise jurisdiction on this issue. For example:

Rules on breakdown of conjugal relationship
Y. Section X does not apply in respect of a reserve of a band, as defined in the *Indian Act*, that has, in accordance with Section Z, established general rules and procedures respecting, in cases of breakdown of a conjugal relationship, the division and use, occupation and possession of matrimonial real property or immovables that are situated on the reserve.

Option 3: Substantive federal matrimonial real property law combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property

In this option, a substantive federal law would be developed that provides protections for matrimonial real property on reserves. This option is different from the first because it would also require federal legislation to allow First Nations to exercise jurisdiction on this issue. Similar to the second option, the federal law would apply on reserves unless and until individual First Nations enact their own laws on matrimonial real property. In this option, some changes to the *Indian Act* would need to be made.

As with the first two options, the third option raises equally important questions. A substantive federal matrimonial real property law would need to address all of the difficult and important issues that provincial and territorial laws currently address off reserves, such as ensuring the best interests of the child are observed; how to address the rights of spouses where multiple families live in the same home; what to do if there is family violence in the home.

A substantive federal law would also need to address a number of issues of specific importance to First Nations citizens, such as how to recognize the distinct ways that First Nations allot land on reserves; how to take into account First Nations traditional and cultural values as they relate to family and land; and how to take into account the interests of non-member spouses.

It is clear that a substantive federal law would need to consider how each of these and many other issues would be addressed.

196 Following the conclusion of the consultation phase, INAC summarized its findings from its consultations with provincial and territorial governments and Aboriginal organizations (other than AFN and NWAC) as follows:

The consultation process provided the opportunity for First Nations and other relevant stakeholders to engage in efforts to determine a solution to the MRP legislative gap that affects so many people in First Nation communities.

In many of the consultation sessions, participants tended to focus on addressing the specific issues rather than discussing the proposed options.

When participants did choose a specific option, Option 3 was most favoured of the options proposed.

Overall, suggestions by participants during the consultation sessions include:

- Incorporate a First Nation mechanism to create and implement MRP legislation;
- Create a balance between the authority of Chiefs and Councils over MRP issues and a First Nation community-driven approach to the decision-making process;

- Maintain federal involvement in MRP issues as the Government of Canada has jurisdiction on reserves pursuant to the *Indian Act* and also has fiduciary obligations toward First Nations;
- Ensure that First Nation organizations are actively involved in the policy-making process;
- incorporate First Nation traditional and cultural values into any legislative solution, i.e. it was suggested that any new MRP legislation respect traditional marriages;
- Develop a legislative solution to immediately address the legislative gap for this complex issue and build on this by enabling a future review of the legislation; and
- Ensure that the best interest of the child is placed first and foremost in the development of an MRP legislative option.

197 While it was generally agreed that the issue of MRP needed to be addressed, criticisms were expressed regarding the consultation process, particularly with respect to the timeframe in which they occurred. The timelines were often viewed as too short, not allowing time to review and properly understand the complexities of this issue. Some participants felt that INAC should have gone directly to individual community members and that information should have been more readily available to everyone and not just disseminated via the internet.

Native Women's Association of Canada

The vision captured by the final report of the Native Women's Association of Canada in this process was entitled *Reclaiming our way of being*. This vision was described as seeking a balance of healthy individuals, families, communities and nations that are grounded in First Nation traditional teachings and knowledge. NWAC identified proposed solutions that were grouped into six broad themes:

- Intergenerational impacts of colonization;
- Violence;
- Justice;
- Accessibility of supports;
- Communication and education; and
- Legislative change.

198 The specific solutions proposed by NWAC are set out below:

Short Term – Intergenerational impacts of colonization

- Federal legislation must include a retroactive clause to financially compensate Aboriginal women and their descendants who suffered a loss as a result of the *Indian Act* legislation;
- Membership and citizenship legislation and policies must be revised to provide choice for women and their descendants regarding band membership; and
- The Aboriginal Healing Foundation and all Aboriginal healing and wellness programs must be expanded and adequately resourced to better address intergenerational impacts of colonization.

Short Term – Violence

- NWAC is provided with resources to develop an effective national strategy to stop violence against Aboriginal women, children and families that contributes to matrimonial breakdown;
- Implement enforcement orders;
- Increased transitional housing for women, children and families; and
- Formalize and recognize the role of Aboriginal women's organizations as an official stakeholder in policy and program design and initiatives.

Short Term – Justice

- Improve access for Aboriginal women to judicial processes which would take into consideration the unique needs of semi-remote, remote and isolated communities;
- The justice system must enforce court orders, Band bylaws, etc.;

- Development of multi-staged systems of Aboriginal mediation or other appropriate Aboriginal systems and practices for justice/decision making under MRP; and
- Assessment and evaluation of the impact of MRP measures implemented under *First Nations Lands Management Act* (FNLMA).

Short Term – Accessibility of supports

- Increase the funding of programs to support Aboriginal women and children to prepare them for healthy relationships and to support them during the breakdown of matrimonial relationships; and
- Ensure that Aboriginal women can access programs and services both on and off reserves, including those living in semi-remote, remote, and isolated communities.

Short Term – Communication and Education

- Develop, implement, and resource an ongoing facilitation and communication process to increase the understanding of Aboriginal women and communities on MRP rights, policies, and processes.

Short Term – Legislative Change

- Implement overarching substantive federal legislation to protect the rights of women and children living on reserve in the interim until First Nation communities can develop their own laws: this legislation should include opt-out and compensation clauses.

Medium Term – Intergenerational impacts of colonization

- A mechanism is developed to implement compensation for the lack of protection for women and their descendants including disenfranchisement from First Nation communities and loss of languages, cultures and identities as a result of MRP;
- Gender-based impact analysis of the Aboriginal Healing Foundation and healing and wellness programs be resourced for improved effectiveness for Aboriginal women, children and families; and
- Repatriation programs are developed and resourced for communities to embrace their members.

Medium Term – Violence

- Subsidized and affordable housing be provided in safe and healthy communities;
- Impact assessment to evaluate the impacts and gaps of existing programs and services which address violence, including shelters and transition houses and to provide additional resources where needed;
- Investigate promising practices for developing healthy communities; and
- Provide transitional housing for men.

Medium Term – Justice

- That legal professionals and the justice system receive training regarding on-reserve Aboriginal rights issues.

Medium Term – Accessibility of supports

- Develop a mechanism to provide a continuum of services for transitional ongoing support for Aboriginal women and children.

Medium Term – Communication and Education

- Establish mandatory federal/provincial/territorial policies for funding and implementation of Aboriginal Studies curriculum;
- Provide additional resources for education and upgrading training to increase employability of Aboriginal women to enable them to rebuild their families, communities and nations including the need to change eligibility requirements such as restrictive age limits; and

- Create a special fund/program specifically for women following marriage breakdown for education, training, economic development, and small business development with no eligibility barriers.

Medium Term – Legislative Change

- An enabling body consisting of Aboriginal women and First Nations representatives should facilitate a consultation and development process based on Indigenous law approaches for the resolution of MRP that is appropriate to each First Nation.

Long Term – Intergenerational impacts of colonization

- Break the cycle of intergenerational impacts of colonization and create the space to re-instill pride in Aboriginal identity and improve self-esteem; and
- Women and their descendants will gain redress for the lack of protections of their rights that they experienced under the *Indian Act*.

Long Term – Violence
Violence is unacceptable

- Communities utilize a collective culturally-relevant approach to resolving conflict; and
- Implement or expand the application of promising practices for developing healthy communities.

Long Term – Justice

- Implementation of a community-based, culturally-appropriate Aboriginal conflict or dispute resolution by First Nation communities.

Long Term – Accessibility of supports

- Aboriginal women and children are able to access their benefits under the *Indian Act* regardless of their residency.

Long Term – Communication and Education

- Individuals, families, communities and nations will have resources and rights-based knowledge to build healthy, viable and sustainable communities.

Long Term – Legislative Change

- Communities utilize Indigenous law, which includes equal participation of women, to resolve MRP issues; and
- Communities will use this expertise to approach all decision making in the community.

199 In addition to these recommendations, NWAC suggested that federal Options 1 and 2 were not acceptable and that some modified version of federal Option 3 might be workable.

Assembly of First Nations

200 The Assembly of First Nations in their final report on their dialogue sessions suggested the following principles should guide the search for solutions and operate as the basis upon which any solution should be evaluated:

- Respect for traditional values;
- Protection of Aboriginal and Treaty rights;
- No Abrogation or Derogation of First Nation Collective Rights;
- Protection and Preservation of First Nations Lands for Future Generations;
- Strengthening First Nation Families and Communities;
- Recognition and Implementation of First Nations Jurisdiction;
- Community-Based Solutions; and
- Fairness.

201 The AFN said that federal Options 1 and 2 involving incorporation of provincial law by reference were flatly rejected in every regional dialogue session. A draft resolution tabled at a 2006 AGA and subsequently adopted by the AFN Executive on 31 July 2006 (No. 21/2006) called for a reorientation of the consultation process to conform with the Crown's legal duty to consult which the AFN insists applies in this subject-matter. A second resolution rejecting all three federal options was adopted by the AFN Executive on 5 February 2007 (No. 72/2006) and a *Consensus Statement by First Nations Women Chiefs* to the same effect was announced on 14 February 2007.

202 Consequently, although the AFN put forward a number of proposed solutions for discussion in the materials presented in their regional dialogue sessions, the AFN's mandate throughout the process required a federal response on matrimonial real property consistent with the implementation of the principles and processes called for by the 2005 *First Nations-Crown Political Accord on the Recognition and Implementation of First Nations Governments*. More specifically, the Accord contemplates the development of mutually acceptable processes for the development of legislation respecting First Nations that involves the exercise of federal powers. It also provides structures and processes for the discussion of issues relating to consultation, the honour of the Crown and the respect and implementation of aboriginal and treaty rights. For these reasons, the AFN maintains Canada has commitments to meet under the 2005 Accord that are relevant to the matrimonial real property initiative. This position was communicated as early as the meetings hosted in 2005 by INAC concerning the development of a response to two Parliamentary Committee reports on the subject of matrimonial real property, and prior to the current federal mandate to consult on matrimonial real property.

203 These constraints on the AFN, as well as mandate issues of other parties, prevented the opportunity in the consensus-seeking phase to fully explore whether an alternative to Option 3 that involved explicit recognition of inherent lawmaking powers of First Nations or some other alternative to delegated powers might be a viable solution. The AFN maintains that any specific legislative proposal the federal government may subsequently develop must be the subject of direct consultations with First Nations. In the end, the participation of the AFN was constrained although it acknowledges that the issue of matrimonial real property is important. Ironically, one of the purposes of the 2005 First Nations-Crown Accord from the AFN perspective was to provide a joint process by which steps could be taken to prevent exactly the type of collision of mandates that occurred in this process.

VII. Conclusions and Recommendations

Lessons Learned: Successes and Barriers to Progress in the MRP Process

204 There were a number of valuable lessons learned from the experience with this consultation process.

205 Although there was not sufficient time to reach consensus between the three parties at the technical working group level, progress was made towards shaping a consensus through substantive discussions of many important policy issues and concerns. Each party expanded its understanding of the issues and of the various interests involved in searching for a solution for matrimonial real property issues on reserves.

206 The parties made every effort to meet the timelines set for the process and brought much insight to the process in each of its phases. The AFN and NWAC both expressed doubt, in different degrees, about the ability of the government to have consultations carried out at the depth required to meet the honour of the Crown in the time allotted. First Nations' concerns about this issue constrained the AFN's mandate in particular. AFN representatives were guided by a mandate determined by the Executive and Chiefs-in-Assembly (see Appendix I). While INAC did provide an extension of time for the process, this did not meet all the concerns respecting the adequacy of the consultation process.

207 Early in the process, the parties developed guiding principles to govern their relations throughout the process. These are included in Appendix J. The parties also agreed to a three-step process for discussing potential legislative and non-legislative options, as follows:

Step 1
Joint exercise by the Working Group to identify principles that would be relevant in assessing any legislative option (whether those below and/or others that come forward); principles could include issues relevant to non-legislative responses needed to ensure implementation.

Step 2
Joint brainstorming sessions to identify a preliminary field of legislative and non-legislative options to be discussed by Working Group (using information from the consultation processes and other sources such as Parliamentary Committees).

Step 3
Joint assessment of each option by checking against adherence to the principles identified in Step 1 and by determining possible outcomes when applied to a range of relevant fact situations – e.g. different landholding and housing arrangements combined with different spousal status in regard to band membership and Indian status.

208 I attended consultation sessions held by the parties and learned much from the participants about the issues and concerns that affect their respective First Nations. The three parties worked very hard in planning and carrying out their respective consultation and dialogue sessions. The materials developed for these sessions and the discussions that took place were substantive, thoughtful and impressive. The participants engaged in the issues with much knowledge while expressing concern about deficiencies in the design of the overall matrimonial real property process.

209 Considerable research material was shared by my office at the beginning of the process to try to build a shared information base. I held information meetings and focus groups with various experts on matters relating to family law, matrimonial real property and aboriginal and treaty rights. I commissioned legal opinions and research to further support the analysis for this report.

210 Regular meetings of the Working Group on Matrimonial Real Property Issues On Reserves were held throughout the planning, consultation and consensus-seeking phases. The parties exchanged views

on relevant principles and values for assessing the utility of any proposed solution. In-depth discussions were held during the consensus-seeking phase that assisted all participants to appreciate the respective views and interests brought to the table.

211 In the end, differences related to process more than substance, which was unfortunate given the importance of these questions to the welfare of people in the communities. A consensus was not possible in part due to mandate problems for all three parties in different degrees. Some of the barriers are identified below.

212 Matrimonial real property is a subject like many others connected to the *Indian Act* that overlaps with other subjects and has many policy linkages. While these linkages were known at the outset, the structure of INAC still leads to a stovepiping of the policy development process in a way that makes progress within the tight timeframe extremely difficult.

213 The inability of the parties to articulate a link between the matrimonial real property initiative and the larger policy development processes that AFN and NWAC respectively are interested in, and that they have mandates to pursue, ultimately constituted a barrier to consensus. This block stems in part from mistrust by the First Nation parties of what would happen to any consensus agreement afterwards. Neither has control of the legislative process that would determine the fate of any consensus that might have been reached and or the ultimate shape of federal legislation that will apply to their people. AFN seeks comfort on process through implementation of the *First Nations-Crown Political Accord on the Recognition and Implementation of First Nations Governments* (RIFNG). NWAC seeks comfort on the inclusion of women in any matrimonial real property process linked to this Accord. As for INAC, it has parallel obligations: to AFN to implement the 2005 First Nations-Crown Accord and to maintain its public commitment to introduce legislation by the Spring 2007.

Consultation Issues and Compliance with *Haida* Case Law

214 Serious issues were raised about the existence of a legal duty to consult on the content of the specific legislative provisions of any Bill. I have taken note of the following statement in *Haida* (at paragraph 50): *"Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."*

215 Guided by the spirit of this direction, and in the absence of a consensus emerging from the consensus-seeking phase, I have made every effort, informed by the discussions held during the consultation and consensus-seeking phase and my own research and analysis to develop a set of recommendations for a legislative framework (set out below) that will meet the requirements of s. 35 (1) and (4) of the *Constitution Act, 1982* and meet the fundamental human rights objectives of this process.

216 As required by my mandate, I have also considered in a general way, issues relating to harmonization to ensure, as much as possible, a coherent matrimonial property regime which recognizes and respects the sovereign jurisdiction of all affected governments.

217 The legislative framework set out in the next section of my recommendations aims to minimize federal activity over the short term by restricting federal legislation to measures absolutely necessary to meet urgent situations and by recognizing First Nations' jurisdiction over the short and long term in a manner consistent with section 35 of the *Constitution Act, 1982*. Again, the aim is to reduce the risk of infringement.

218 I have taken note of the following statement of the Chief Justice of the Supreme Court in *R.* v. *Adams*[49] and which has been quoted subsequently by the Supreme Court in *Haida* and *Mitchell*.

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.

219 You may wish to seek advice on how this direction from the Court may apply to any legislative proposal and draft legislation that emerges from decision-making on the issue of matrimonial real property, and whether the legislative framework set out below assists in that regard.

220 If there is a duty to consult that requires further consultation and accommodation, I recommend the inclusion of a provision in the legislation providing for a documented consultation process to take place prior to an Order-in-Council bringing into force any Bill for any given First Nation. This proposed procedure is modeled after that used for enabling legislation like the FNLMA and the *First Nations Commercial and Industrial Development Act* (FNCIDA). In each of these cases, the legislation only comes into force for a particular First Nation upon the adoption of an Order-in-Council. A modified version of this option would allow legislation to be developed and passed by Parliament while providing a means to ensure that the Crown fulfills any remaining or specific legal duty to consult that it may owe to any specific First Nation whether as a treaty or aboriginal right. It would allow the government to fill in any gaps in consultation before legislation applies to a given First Nation. This need not be a lengthy process; it could be carried out through regional offices through a combination of correspondence and meetings and would provide a clear record on consultation with each First Nation. This would not prevent the ultimate application of federal legislation, rather it would remove any possible legal vulnerability on the duty to consult and would also fulfill a public legal education process that both the AFN and NWAC feel are very much in need. A provision allowing for the modification of the application of the legislation by Order-in-Council and/or agreement with a given First Nation would provide the flexibility to make adjustments as required (again like FNCIDA). If Parliament agrees to this, there will be no question of the government trenching on Parliamentary privilege.

221 The Constitution of Canada is the supreme law of Canada.[50] Accordingly, Section 35 rights should be accorded the same degree of respect as Charter rights in the protocols for reviewing draft Bills prior to their introduction to Parliament. I recommend that in addition to a Charter rights analysis, the Crown undertake a section 35 analysis, including section 35(4), of any proposed legislation prior to the introduction to Parliament of a Bill on matrimonial real property. In other words, the Department of Justice should be asked to confirm the compliance of the legislation with both the Charter and section 35 of the *Constitution Act, 1982*. Necessary elements of this task would include 1) an identification of the many provisions of the *Indian Act* which protect the collective interests and aboriginal title of First Nations in their reserve lands; 2) an analysis of the role these *Indian Act* provisions currently play in protecting section 35 interests in reserve lands such as aboriginal title; 3) ensuring there is no negative impact on such rights flowing from any proposed provisions by analyzing the relationship between the *Indian Act* and the proposed new legislative provisions. All of these steps may be required to ensure a full picture of the risk of any potential infringement and how to deal with any such risk.

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[49] [1996] 3 S.C.R. 101 at paragraph 54.

[50] S. 52 (1) of the *Constitution Act, 1982*: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

222 I recommend joint work between yourself and the Minister of Justice to develop guidelines for INAC and Justice in their work together to nourish a culture of section 35 compliance and to ensure that legislative initiatives are properly vetted in regard to section 35 compliance. Policy guidelines and directives such as the following could be developed to ensure the constitutionally protected rights in section 35 of the *Constitution Act, 1982* are treated with the same respect for the rule of law and that is accorded the Charter of Rights and Freedoms.

1) Certifying that every proposed law and policy comports with section 35 of the *Constitution Act, 1982* and the fiduciary duties of the Crown;
2) Counselling departments and agencies of government of Canada's fidelity to section 35, creating a culture of respect in Government for Aboriginal and treaty rights;
3) Promoting compliance with international legal obligations in relation to First Nations;
4) Directing that Canada's interventions before the courts comport with section 35; and
5) Parliamentary/public role – promoting awareness of section 35 Aboriginal and treaty rights.

223 Federal policy explicitly states the inherent right of self-government is a section 35 right.[51] Given this statement, and contemplating the question of compliance to *Haida*, it appears to me that there may be additional questions to consider respecting a section 35 analysis and matrimonial real property issues. For example, are there any actual or constructive notice issues arising from any of the following:

1) The above quoted statement in federal policy that the inherent right of self-government is a section 35 right;
2) The recommendations of the Royal Commission on Aboriginal Peoples formally submitted to the Privy Council and which include conclusions concerning the existence of the inherent right of self-government and its content vis-à-vis family law and what should be done respecting matrimonial real property;
3) Existing court decisions finding aboriginal title interests of First Nations in their reserve lands;
4) The First Nations-Crown Political Accord on the Recognition and Implementation of First Nations Governments of May 2005;
5) The various resolutions received to date and information received in the consultation and dialogue sessions in which First Nations assert various aboriginal title and rights?

224 The Department should develop, as soon as possible, specific policies and procedures relating to consultation in order to ensure that future consultation activities can identify and discharge any legal duty to consult while also fufilling objectives of good governance and public policy by:

1) Ensuring First Nations have relevant information to the issues for decision in a timely manner;
2) Providing an opportunity for First Nations to express their concerns and views on potential impacts of the legislative proposal and issues relating to the existence of a duty to consult;
3) Listening to, analyzing and seriously considering the representations and concerns of First Nations in the context of relevant legal and policy principles including their relationship to other constitutional and human rights principles;
4) Ensuring proper analyses by the Department of Justice of section 35 issues relating to any proposed legislative initiative are thoroughly canvassed before, during and after consultations;
5) Seriously considering proposals for mitigating potentially negative impacts on aboriginal and treaty rights or other rights and interests of First Nations and making necessary accommodations by changing the government's proposal
6) Establishing, in consultation with First Nations, a protocol for the development of legislative proposals.

[51] "The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982…The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right..", page 3 of *Federal Policy Guide Aboriginal Self-Government: The Government's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.

Elements and Principles for a Viable Legislative Response

225 The diverse laws, policies, and legal traditions of First Nations are reflected in the approaches taken by them to allotment of housing, to land and to family relationships. The diverse experience and responses of First Nations to the process of colonization are also reflected in their contemporary laws and policies (for example, whether the Certificate of Possession system is used or not, how certificates of possession were introduced to communities, whether custom allotment systems are used and what these look like). Accommodating and respecting this diversity must be an element of any legislative initiative respecting matrimonial real property on reserves.

226 The role of First Nation governments in the building and financing of homes on reserves also makes the landholding and housing situation both from a legal and social perspective very different than off reserves.

227 Another layer of law affecting landholding and housing patterns on reserves are the Indian status and band membership provisions of the *Indian Act* (past and present provisions have impacts today), band membership codes and band residency bylaws. With some qualifications, band membership can be within the control of First Nation governments, but the federal government has retained sole lawmaking control over the determination of Indian status.

228 A layer of legal complexity and diversity coming from outside First Nations communities are matrimonial property laws of general application that now apply to a limited extent to reserve communities. This will require rules to promote harmonization of jurisdiction (both in respect to First Nation jurisdiction and federal jurisdiction) over matrimonial real property with the diverse policy choices provincial governments have made respecting the balance of matrimonial property interests. An area of key concern in this regard is the diverse treatment of common-law relationships by provinces and territories, as well as definitions of what constitutes matrimonial property.

229 Overall, the result is a legal, social and cultural situation that has no parallel off reserves. This in turn compels the conclusion that as much as possible, decision-making power in the design of matrimonial real property laws applicable on reserves must be left to each individual First Nation. This also means attempting a wholesale transfer of provincial-type rights and remedies to a reserve context would not work.

230 Several specific factors relevant to the design of a legislative framework to improve the situation of spouses on reserves respecting matrimonial real property include:

1) Giving children's interests primacy especially their needs for shelter, stability and access to their culture;
2) Ensuring immediacy of access to remedies over the short term;
3) Maintaining the principles of non-alienation of reserve land and protection of First Nation collective interests in their reserve lands; and that these not be impaired or infringed;
4) Acknowledging the role of the Crown in launching the process of colonization, maintaining it and controlling many of the levers for reversing it in a manner consistent with reconciliation;
5) Recognizing First Nation jurisdiction over the determination of spousal interests in the matrimonial home and other matrimonial real property, including authority in relation to local dispute resolution;
6) Recognizing First Nation jurisdiction over matrimonial real property in a manner that recognizes and respects fundamental human rights, aboriginal and treaty rights, including aboriginal title;
7) Reaffirming the equality of men and women;
8) Acknowledging the need to address the historic and discriminatory impacts of the *Indian Act* in excluding First Nation women from property and civil rights;
9) Acknowledging that women are disproportionately negatively impacted by the lack of matrimonial real property protections on reserves;
10) Recognizing that the more prescriptive federal legislation is, the greater the risk of infringement of any aboriginal and treaty right;

11) Trusting that First Nations governments can protect our human rights at least as well as the federal government; First Nations governments should not be treated with lesser or greater suspicion or scrutiny than federal and provincial governments; and
12) Ensuring resources are in place for the capacity building and institution building that are pre-requisites for a functioning and comprehensive matrimonial real property regime (for lawmaking, land management, land and housing registries and dispute resolution mechanisms and processes).

231 The collective and individual experience of First Nations and First Nation people with colonization[52] has in turn shaped the questions that lie at the heart of this initiative. These questions are:

1) What is the federal government's responsibility to recognize First Nation jurisdiction over matrimonial real property over the short and long term?
2) What federal response is required to address situations where there is a lack of legal protection respecting disputes over rights to family homes on reserves?
3) What federal response is required to address a lack of capacity for enforcement of existing First Nation laws, policies and traditions?
4) What legal protections are needed to acknowledge and address current impacts arising from the historic exclusion of First Nation women, under the *Indian Act*, from their property and civil rights?
5) How might Canada and First Nations move forward to meet these needs in a way that respects and recognizes First Nations' jurisdiction, rights and title and fundamental human rights?
6) What short and long term legislative responses need to be taken by the federal government and by First Nation governments?
7) What do First Nations governments need to do to respond to the interests of First Nation women along with other citizens in regard to matrimonial real property and to include them in decision-making?

Proposed Legislative Framework

232 While a consensus was not reached among the three parties on the specifics of a legislative model and the process for developing it, the legislative framework I am recommending is inspired and informed by the discussions held with the Assembly of First Nations, the Native Women's Association of Canada and the Department of Indian Affairs and Northern Development, discussions held across the country with First Nation people, the input of participants in focus groups as well as independent legal advice.

233 Throughout the consultation and consensus-seeking phases, it seems clear that federal options 1 and 2 listed in the INAC consultation documents were considered to constitute infringements that are not justifiable as well as posing too many practical problems in terms of harmonization and conflict of laws. This is a view supported by several of the provincial governments, the AFN, NWAC and the two independent legal analyses I commissioned on this question. (A third piece of work focused on issues of rights and remedies independent of the options proposed by the federal government.)

234 On page 91 is a chart summarizing the legislative framework I am recommending to meet the various requirements of my mandate. The basic scheme of the Act would be a concurrent jurisdiction model with paramountcy of First Nations law where there is inconsistency or conflict with either federal or provincial law with respect to matrimonial property. In this regard, the maximum scope of lawmaking responsibility should be left to First Nations' jurisdiction and federal activity should be as minimal as required to meet human rights concerns.

235 A possible title for the legislation might be "*A Law respecting First Nations, Matrimonial Real Property and Dispute Resolution*".

[52] Colonization may be defined as the imposition of governance from outside First Nations.

236 The proposed legislation would consist of two parts. Part 1 adopts a rights recognition approach to the issue of matrimonial real property and First Nations' jurisdiction. This is not only desirable as a matter of principle but should be considered as a practical means for the federal government to recognize and affirm aboriginal and treaty rights, and to avoid infringement as much as possible.

237 ***Preamble***

Parts 1 and 2 would be preceded by a Preamble setting out important principles providing context for the interpretation of the proposed legislation. As examples, such principles could include:

1) The need to act in a manner consistent with fundamental human rights principles;
2) The need to provide immediate interim federal measures to ensure protection for spousal interests in regard to matrimonial homes on reserves;
3) Acknowledging the importance of the principle of reconciliation in respect to existing aboriginal and treaty rights and the sovereignty Crown;
4) The desirability of recognizing First Nation jurisdiction over the determination of spousal interests in relation to the matrimonial home and other matters concerning matrimonial on reserves;
5) The inherent right of self-government is a section 35 right;
6) The need for cooperation and reconciliation between First Nations and the Crown on matters relating to matrimonial property on reserves;
7) The equality of men and women;
8) The importance of including women at all levels of decision making as equals;
9) The priority interests of children in determining matters relating to the spousal interests in the matrimonial home; and
10) The need to take into account the interests of other family members and First Nations' cultural interests.

238 ***General Provisions***

There will be a need for some general provisions. First, definitions of key terms such as: "child", "common-law relationship", "dependent adult", "family", "First Nation governments", " First Nation reserve land", "immovable", "matrimonial home", "spouse", "real property", "violence".

Second, there should be a "for greater certainty" provision confirming the continuing status of *Indian Act* reserve lands as "lands reserved for the Indians". The wording used in the *First Nations Land Management Act* may be of assistance:

Title to First Nation land

For greater certainty,

a) Collective title to First Nation land is not affected by this Act;
b) First Nation land continues to be set apart for the use and benefit of the First Nation for which it was set apart; and
c) First Nation land continues to be land reserved for the Indians within the meaning of Class 24 of section 91 of the *Constitution Act, 1867*.

239 ***Applicability***

Third, a general provision is required describing the applicability of the Act and excluding reserve lands to which the *First Nations Land Management Act* applies. In discussions with the participating First Nations which operate under the FNLMA, you may wish to consider whether any further reference is required in order to address any gap that may exist from the date a First Nation's land code comes into force and the adoption of a First Nation's matrimonial real property law pursuant to FNLMA. If such action is required or desirable, the consent of participating First Nations through amendment of the Framework Agreement on First Nation Land Management (as amended) would likely be required.

The paramountcy clauses of claims agreements and self-government agreements presumably ensure the land and self-government regimes of First Nations in these situations would not be affected and would not require reference in the proposed legislation. Since the 1994 federal policy on the inherent right of self-government was adopted, there has been a direction to ensure the existing legislative gap under the *Indian Act* is not continued as an outcome of any claims or self-government agreement. For claims and self-government agreements that deal with land matters since the adoption of that policy, matrimonial real property is dealt with in various ways that address the *Indian Act* gap. The few agreements negotiated prior to that policy appear to operate in a way that involves a legislative gap. This is a matter that would require the consent and agreement of the parties to those agreements to address.

Fourth, the Act should apply to common-law couples and couples married by custom, as well as persons married under provincial law. This can be achieved by providing a definition of the term "spouse" that is sufficiently broad. The *Indian Act* provides a definition of "common law partner"[53] and of "survivor" but not of "spouse". Some careful consideration will need to be given to this issue in proposed legislation on matrimonial real property for the interim federal rules. First Nations are free to define terms in their own laws.

NWAC has suggested the following definition for the operation of interim federal rules. This proposal is intended to capture the scope of relationships recognized by provincial, federal and First Nation laws taken together:

"Spouse" means a person who has gone through a civil or religious ceremony of marriage with another, or has a civil union with another, or who has become married to another through Aboriginal customary law, or who has lived with another in a conjugal relationship for at least one year, or who is in a relationship of some permanence with another person in which both members of the relationship are the natural or adoptive parents of a child." Likewise, Teressa Nahanee's paper discusses this issue in some detail and may be of some assistance.

240 ***Harmonization Considerations***

Another important factor to consider is how Canada reconciles the diversity inherent in having both common law and civil law jurisdictions as part of our national legal system. There are at least two statutes that provide a framework and specific rules to achieve harmonization between these two legal traditions. The federal *Interpretation Act* speaks of a "duality of legal traditions" and provides rules for the interpretation of federal law dealing with property and civil rights in Canada in sections 8.1 and 8.2 in a way that respects both common law and civil law traditions.[54] This will no doubt have to be taken into consideration in the drafting of any federal legislation dealing with matrimonial real property on reserves. Further guidance is provided in the *Federal Law-Civil Law Harmonization Act, No.1*[55], whose preamble emphasizes that harmonious interaction between federal legislation and provincial legislation is essential and requires an interpretation of federal legislation that is compatible with the common law and civil law traditions.

241 John Borrows suggests that principles and structures similar in function to these should be established for indigenous legal traditions. Such legislation he says should recognize the inherent rights of indigenous peoples to property and civil rights within their legal traditions. He further suggests that principles from the preamble of the *Federal Law-Civil Law Harmonization Act, No.1* might be inspirational in approaching this task.[56] Borrows makes a number of very useful recommendations about the contents of a proposed *Federal Law-Indigenous Law Harmonization Act*.

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53 Section 2 of the *Indian Act* defines "common-law partner" as follows: "in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year". The term "survivor" is defined as follows: "in relation to a deceased individual, means their surviving spouse or common-law partner."

54 *Interpretation Act*, R.S.C. 1985, c.I-21.

55 *Federal Law-Civil Law Harmonization Act, No.1*, S.C. 2001, C.4.

56 John Borrows, *Indigenous Legal Traditions in Canada,* Report for the Law Commission of Canada, January 2006 at p. 168-173.

To me, his ideas speak to the notion of reconciliation that the Supreme Court of Canada has directed First Nations and Canada to engage in. I recommend that instructions to drafters of the legislation take into account this type of approach.

242 *Review of Act's Implementation*

Fifth, a provision should be included to provide for a review of the Act and its implementation. Some suggested wording is set out below to illustrate this idea:

Review of Implementation

Three years upon the coming into force of this Act, the Minister shall table a report to Parliament, following consultations with First Nations, that:

a) Reports on progress respecting implementation;
b) Provides a record of consultations undertaken with First Nations in preparing the Minister's report and indicating which First Nations were consulted, the participation of First Nation women in consultations, a description of any concerns expressed during consultations concerning the provisions of this Act or its implementation, and the Minister's proposals for accommodating or addressing those concerns;
c) A gender-based analysis of the matters reported on.

243 Sixth, to ensure that the new law respecting matrimonial real property prevails in the event of any conflict or inconsistency with those laws of provincial application that do apply on reserves in respect to matrimonial property generally, a consequential amendment to s. 88 of the *Indian Act* may be needed. This change would simply add the name of the new legislation, as was done with the *First Nations Fiscal and Statistical Management Act*:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, ***A Law respecting First Nations, Matrimonial Real Property and Dispute Resolution***, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

244 Seventh, additional amendments to the provisions of the *Indian Act* dealing with interests held by Certificate of Possession may be required to ensure consistency with the new legislation. For example, provisions of the *Indian Act* relating to certificates of possession may require amendment to provide for registration of spouses of holders of certificates of possession. This would be for the purpose of providing notice of a spousal interest that may exist under the new law. The provisions respecting certificates of possession will require a close review for consistency, without infringing any collective interests or aboriginal or treaty right. In this regard, an analysis prepared by Teressa Nahanee may be of assistance in identifying relevant provisions. While this analysis appears to presume that amendments are taking place within the *Indian Act*, which I am not recommending, the detailed analysis in that paper gives an idea of the kind of review required to ensure a functioning regime at the end of the day.

Part 1 - Recognition of First Nations' Jurisdiction Respecting Matrimonial Real Property

245 Provisions relating to the recognition of First Nations' jurisdiction should be set out in Part 1 before the interim federal rules, in order to emphasize the paramountcy and preference for the operation of First Nations' jurisdiction in this area. The recognition of this inherent jurisdiction means it is concurrent with federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. This is a model familiar to modern claims and self-government agreements. There is much experience to draw on with respect to paramountcy clauses to ensure that federal, provincial and First Nations laws work together in this area to provide the protection needed by spouses on reserves.

246 I have set out some sample drafting of recognition language below; language that must be complemented by preambular statements relating both to the inherent right of self-government as a section 35 right, and the importance of human rights and the equality of men and women. Under this proposal, First Nation jurisdiction over matrimonial real property would necessarily and incidentally include jurisdiction to establish local dispute resolution mechanisms. There are two reasons for this: the need for local, culturally relevant dispute resolution bodies and the inaccessibility of the existing court system for many First Nation people and communities due to remoteness, lack of financial resources and other factors.

First Nations Jurisdiction Respecting Matrimonial Real Property

X (1) First Nation governments have jurisdiction to adopt laws in respect to:

a) the rights and interests of spouses in a matrimonial home located on any reserve set aside for the benefit and use of the First Nation enacting such a law;
b) the rights and interests of spouses in regard to any other type of dwelling or structure that a First Nation law may define as matrimonial real property, an immovable or other interest in land recognized by the First Nation and located on any reserve set aside for the benefit and use of the First Nation enacting such a law;
c) the rights and interests of spouses in regard to any lease or leasehold interest located on any reserve set aside for the benefit and use of the First Nation enacting such a law and in which either or both spouses have an interest; and
d) the rights and interests of other family members who may be living with spouses.

(2) For greater certainty, the jurisdiction referred to in s. X(1) includes authority to establish local dispute resolution bodies to assist spouses in the resolution of matters respecting matrimonial real property, immovables or other interest in land recognized by the First Nation.

(3) Notwithstanding the jurisdiction described in s. X(1), the provisions in Part 2 will apply to the reserve lands of the bands listed in Schedule 1 until the coming into effect of a law referred to in s. X(1) in accordance with the provisions in s. X(4).

(4) A First Nation law referred to in s. X(1) shall come into effect upon a date determined by such.

(5) In the event of a conflict or inconsistency between the provisions of a First Nation law adopted in accordance with the provisions of this Part and a provision of the *Indian Act* other than sections 18, 28, 29, and 37, the First Nation law shall prevail to the extent of any conflict or inconsistency.

Part 2 – Interim Federal Rules Respecting Matrimonial Real Property on Reserves

247 Part 2 would provide interim federal rules establishing protection for the short term until a First Nation had adopted its own law respecting matrimonial real property. I have suggested short-term remedies that would be available under this Part and a rationale for each. There are compelling human rights considerations to justify short-term federal action to ensure there is some immediate relief available for First Nation spouses pending the adoption of matrimonial real property laws for those First Nations who do not have them. Additional protection over the short term will be available through the exercise of First Nation jurisdiction consistent with Part 1 of the proposed legislation.

248 ***Prohibition Against Sale of Matrimonial Home***

In a case where a home is located on CP-held land, there is currently nothing preventing the spouse whose name is on the CP from selling without their spouse's consent. While spouses are married, and particularly when there are children, each family member should have the security of being protected from having the matrimonial home sold from underneath them, regardless of which spouse or whether both spouses' names are on the legal documents relating to the home. The provision of

this remedy on reserves is long overdue, for homes on CP-held allotments or homes owned by individual members and located on general band lands.

Implementation would likely require some mechanism or mechanisms to provide for the registration of a spouse's name in the Indian Land Registry where applicable, and support for those First Nations who may want to establish a separate registry for homes alone regardless of whether they are located on CP-held land or general band lands.

249 ***Interim Remedies – Exclusion Orders and Orders of Interim Exclusive Possession of the Matrimonial Home***

Remedies providing temporary exclusive possession of the matrimonial home are needed on reserves to deal with situations of crisis and to provide spouses time to stabilize their situation while making longer-term plans. Interim possession remedies present few if any difficulties in terms of scope of potential infringement on collective interests precisely because of their temporary nature. These would include:

1) Interim exclusion orders to allow a spouse to have temporary exclusive possession of the matrimonial home in response to a crisis prompted by domestic violence (in some jurisdictions applications can be made by a spouse or a third party on behalf of the spouse in need of protection); and
2) Interim exclusive possession orders available on application by a spouse upon separation and to also ensure a spouse with custody of children can provide shelter and stability.

250 ***Order for Compensation for Value of Matrimonial Home***

The diversity of First Nations' values and practices respecting interests in reserve land must be respected and a distinction acknowledged in the new legislation between the matrimonial home as an improvement on the land and an interest in reserve land itself. This means leaving remedies involving the transfer or forced sale of a spouse's interest in land to be determined by First Nations' jurisdiction under Part 1.

251 To address the interests of all spouses, whether members or non-members and to address the interests of all spouses in the matrimonial home separate from the property interest of the First Nation collectively in the reserve land, a new compensation remedy is required – one that is tied to the value of the matrimonial home as an improvement. I am recommending that the new legislation provide for the power of courts of competent jurisdiction, upon nullity, separation or divorce, to grant applications by spouses for compensation orders to divide the value of the matrimonial home. Only the structure of the home as an improvement would be taken into account in conducting an appraisal or valuation. This proposed provision should be worded in such a way that recognizes the contributions of spouses to the marital relationship and to matrimonial real property including financial contributions as well as contributions in kind such a childrearing or other unpaid work in the home.

252 There are similar mechanisms already in the Act for non-marital situations where compensation is required for improvements. Sections 22, 23 and 25 are examples.

253 Sections 22 and 23 deal with the entitlement of a member for compensation for permanent improvements which he or she has made to land that is subsequently included in a reserve.

22. 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. 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.

254 Section 25 provides compensation for improvements made to reserve land by an Indian who ceases to be entitled to reside on a given reserve:

> *25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.*
>
> *(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.*

255 Policy directives of the Department provide guidance to officials in dealing with these situations. Agreements are usually negotiated between a First Nation and the member. The Minister and the Department may become involved where an agreement cannot be reached.[57] INAC policy directives also provide information on the way in which compensation is determined and valuations of the improvements are made, as well as procedures where the First Nation and a member cannot come to an agreement on compensation for improvements. First Nation land managers and the First Nation government have roles in the determination of such issues. In other words, there is an existing body of practice to draw on that may be relevant or could be adapted in dealing with interests in a matrimonial home as an improvement and by recognizing First Nation jurisdiction in place of Ministerial discretion.

256 Directive 3-5 of the *Indian Lands Manual* explains that where the council and an individual cannot agree on compensation for improvements under section 25, the Minister must exercise his discretionary powers pursuant to s. 25(2) of the *Indian Act*. A comprehensive investigation is undertaken to identify the improvements to the reserve property in question. The directive further states that "*The report on this investigation, in conjunction with Public Works and Government Services Canada (PWGSC) should include: (a) identification of the improvements and confirmation of ownership; (b) the value of the improvements, determined either by independent appraisal where possible, or by a mutually acceptable sum agreed upon by the individual and the First Nation council; and (c) basis for the dispute with recommendations for its resolution*." It is the Lands Officer of the First Nation who arranges for an appraisal to valuate permanent improvements to the land, and the directive recommends a review by PWGSC. In the case of section 25 improvements, if a Ministerial Order is required because there is no agreement between the First Nation and the member, the Lands Officer, with the assistance of the Department of Justice, prepares the Order setting out the compensation to be paid to the individual for improvements to the subject property and confirming that the right to possession of the land has reverted to the First Nation. The Lands Officer is responsible for sending the Order for approval and registration.

257 It should noted that there is a strong interest by both the AFN and NWAC in the establishment of a spousal loan compensation fund as a means of assisting spouses in the enforcement of compensation orders in relation to matrimonial real property on reserves. Again existing procedures with some necessary modification to recognize First Nations' jurisdiction instead of Ministerial discretion, perhaps could be examined and adapted in further discussions between INAC, AFN and NWAC on the feasibility of establishing a spousal loan compensation fund.

258 ***Derrickson-type Compensation Orders***

In *Derrickson*, the Court used an existing provision of the B.C. *Family Relations Act* that could be applied to spouses on reserves to make an order for compensation that was fair and equitable in relation to the value of the matrimonial home and the CP-held land on which it was located. This remedy was granted in place of the remedy that was not available – an order of division. In that case,

[57] Department of Indian Affairs and Northern Development, *Land Management Manual*, Chapter 3, Directive 3-2 and 3-5.

the specific provision relied on to grant this compensation remedy was s. 51 of the *Family Relations Act*, R.S.C.B.C. 1979, C. 121 (as that act stood at the time of the litigation).

259 It appears that every provincial and territorial jurisdiction has a similar provision but this should be confirmed by the Department of Justice as well as the question of their applicability to reserve lands as laws of general application that do not conflict with the *Indian Act*. If in fact, each jurisdiction has a similar provision that operates like the one at issue in *Derrickson*, then one option is to simply leave provincial law to operate as it does now.

260 An alternative option would be to enact one federal provision providing this type of remedy on a national basis for spouses with matrimonial homes on CP-held land. It is not clear whether *Derrickson*-type orders are currently available to non-member spouses, and this should also be confirmed one way or the other by the Department of Justice. Given that real property on reserves may be inherited and sold by non-member spouses pursuant to s. 50 of the *Indian Act*, there is statutory precedent for non-member spouses being able to share in the value of matrimonial property on reserves so long as they do not acquire a permanent interest in the land itself.

261 ***Enforcement of Domestic Contracts***

In all jurisdictions off reserve, there is provision for courts to enforce valid agreements reached between spouses concerning their matrimonial property and other family law matters such as support. Such agreements may be entered into before marriage (a pre-nuptial agreement) during marriage (a marriage agreement) or upon marriage or relationship breakdown (a separation agreement). These agreements serve the useful purpose of having the spouses determine their future by mutual agreement. The content of such agreements can be influenced by what the parties believe are likely outcomes if the matter went to court. Unfortunately because of the current legislative gap concerning matrimonial real property on reserves, while spouses on reserves can enter such agreements, there is no means of enforcing their performance if a spouse refuses to live up to his or her contractual obligations.

262 I am recommending that interim federal rules include a provision allowing for the court enforcement of domestic contracts entered into by spouses on reserves. You may wish to consider wording that is sufficiently broad to ensure enforcement of such agreements in their totality, as provisions in such agreements relating to matrimonial property may well be integrally tied to what the parties have agreed to in other areas such as support. This recommendation may require not only a provision in the proposed new legislation but consideration of relevant provisions of the federal *Divorce Act*.

263 ***Other Remedies upon Evidence of First Nations Laws and Customary Practices***

I recommend that the legislation provide courts power in applying interim federal rules some flexibility to fashion new interim remedies rather than limiting choices to existing provincial type remedies. This could allow First Nation diversity and legal traditions to be recognized and taken into account by the courts. It would provide for First Nation input into what remedies would work best in their communities. This could be achieved through the establishment of Friend of Court provision with federal resources provided for its implementation and provisions confirming the standing of First Nations on such matters.

264 However, court orders for transfer of a matrimonial home and orders for partition and sale are not recommended for inclusion in the interim federal rules. The variations among First Nations in their use of certificates of possession and custom allotments and their diverse views about whether individual First Nation members can possess any real property interest in the land itself means that respect for self-government principles should leave the determination of such issues and the availability of these remedies to First Nations' jurisdiction. These are issues First Nations can move on immediately given their concurrent jurisdiction over matrimonial real property.

265 ***Criteria to Guide Court in Making Orders under Interim Federal Rules***

Under the interim federal rules, courts will require some direction in making decisions. Some of the typical criteria used in provincial laws are relevant to First Nations citizens as well, such as taking into account the interests of children or the presence of domestic violence. However, there will be a need for courts to consider criteria relevant to diverse First Nation communities. The legislation should enable evidence to be brought in of First Nations' particular social situations laws and policies and their specific practices relating to clan ownership of clan property. An example of criteria developed specifically for a First Nation context can be found in section 8 of the *Westbank First Nation Family Property Law* which also includes criteria typical of provincial laws. However, caution must be exercised in looking at precedents like Westbank. What works for one First Nation cannot be assumed to work for another. Provisions for a Friend of the Court mechanism and for standing by the affected First Nation would be of assistance in getting such evidence before the court, where the existing court system is being relied on.

Matrimonial Real Property on Reserves
Concurrent Jurisdiction Model (Federal and First Nation)

		Interim Federal Rules*	FN Jurisdiction* (paramount in regard to interim federal rules)
Field of MRP Rights & Remedies	**Prohibition Against Sale of Matrimonial Home** (without consent of Spouse during marriage)	Available (member and non-member spouses)	As determined by FN law
	Exclusion Order (for violence)	Available (member and non-member spouses)	As determined by FN law
	Order of Interim Exclusive Possession	Available (member and non-member spouses)	As determined by FN law
	Order for Compensation (in relation to division of value of matrimonial home as an improvement and not in relation to the value of the reserve land on which the MH sits)	Available (member and non-member spouses)	As determined by FN law
	Derrickson-type Compensation Order (for share of value of matrimonial home and CP-held land on which it sits – available to members only)	Available (either by leaving to provincial law (status quo) or by enacting a federal provision to apply uniformly to all jurisdictions)	As determined by FN law
	Domestic Contracts (Pre-nuptial, Marriage, Separation)	Available (for remedies and protections available under interim federal rules)	As determined by FN law
	Other Orders (upon Evidence of FNs Laws & Customary Practices)	Available	As determined by FN law

** Federal and First Nations laws would be subject to human rights review (Charter, CHRA and international human rights standards).

266 ***Dispute Resolution and Enforcement of Orders***

Concerns about access to justice and the enforcement of court orders were raised throughout the process, and were often put forward as an argument to question the capacity of federal legislation to be of real assistance to spouses in crisis on reserves. Reasons for this view include:

a) The vast majority of First Nation people would be unable to access the existing court system due to cost and geographical remoteness in addition to cultural and other barriers;
b) There are often jurisdictional disputes about whether federal courts or provincial superiour courts are the appropriate forum for a particular subject matter of litigation arising from a reserve context;
c) There are often difficulties in securing enforcement of court orders and First Nation laws when police or other enforcement personnel must be relied on for assistance;
d) For remote communities, even where there are fly-in courts, these courts are often restricted to criminal law matters and there is typically no access to a family court without traveling some considerable distance, and most First Nation people simply do not have the resources;
e) If part of a matrimonial property settlement is to be achieved under provincial law under a superiour court system and matrimonial real property orders may be acquired under another law in possibly a separate court system (e.g. federal or First Nation), there will be some important harmonization issues to resolve that could affect enforcement.

267 These are all major administration of justice issues affecting the ultimate viability of any substantive law relating to matrimonial real property on reserves. (Many of these issues are not restricted to the subject of matrimonial real property on reserves - again pointing to the need for a broader policy agenda and plan of action.) For this reason, it will be necessary to move quickly under Part 1 to recognize the jurisdiction of First Nations over dispute resolution in this area and to provide resources to First Nation communities to establish local dispute resolution bodies, or to aggregate in the formation of regional bodies, if they so choose. I also recommend that discussions be held with the Department of Justice to incorporate this element into an action plan for renewal of the Aboriginal Justice Strategy. This is another reason to examine the notion of a First Nations-Federal Harmonization Act.

268 I also recommend ensuring that the recognition of the lawmaking authority of First Nations include a recognized power to allow decisions of local dispute resolution bodies to be capable of enforcement as an order of a provincial or superior court. (This would likely require discussions between interested First Nations and provincial governments).

269 Innovative ways of using the existing court system at all levels should be explored as speedily as possible. I realize there may be complex constitutional issues to work out, but every effort should be made to work through these challenges and find mechanisms to ensure that justice is available at the community level on this matter over the short term. For example, any possibility of using justices of the peace, provincial courts or new First Nation family courts for the purpose of making the orders proposed by Part 2 should be examined. Another avenue to explore may be the establishment of federal justices of the peace from the First Nation community to deal with family law matters. Such a measure could provide a vehicle for the enforcement of both the interim federal rules and First Nation laws, if First Nations so chose.

270 As a final general comment on the importance of access to justice issues, I bring your attention to the observations of the Honourable M.E. Turpel-Lafond in an article entitled "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System"[58]. Judge Turpel takes note of a move away from focus on separate justice systems and instead on a "shared justice system that is accessible, affordable and represents the highest and best expression of social and cultural inclusion". She goes on to comment: "*One inclusive and respectful justice system providing access for all citizens to peaceful dispute settlement through law is a powerful backdrop for justice reform,*

[58] (2005) 68 *Sask.L. Rev.* 293.

and if pursued with sincerity, would require fundamental changes. This is based on the assumption that genuine inclusion is something more than cultural, linguistic and normative assimilation into the colonial system, and that the justice system must change to more completely reflect the society it serves." Judge Turpel also states "*I would suggest that the discussion on justice reform should address how we can move forward, given a history of separate solitudes, into the single strong system which is fully inclusive and respectful*." This analysis, in my view, is consistent with the proposals for recognition of indigenous legal traditions proposed by John Borrows and discussed earlier in this report, and my recommendations respecting the need to recognize and resource First Nation dispute resolution mechanisms and jurisdiction.

271 Section 89, *Indian Act*

Another issue to consider is s. 89 of the *Indian Act*. Section 89 provides exemptions from attachment or seizure of the personal and real property of "Indians"[59]. Section 89 reads as follows:

> *89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.*
>
> *(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.*
>
> *(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.*

272 The effect of this provision obviously makes the enforcement of court orders by non-Indians in relation to property of Indians located on reserves more challenging. This affects spouses of First Nation members who have neither status under the *Indian Act* nor band membership.

273 Section 89 of the *Indian Act* presents some difficult policy issues. On the one hand, it would not be useful to extend compensation remedies that are practically unenforceable in their application to non-member, non-Indian spouses. On the other, there should be no attempt to open s. 89 in any way that would allow any seizure of reserve land for the benefit of a non-band member. Whether or not it is wise to lift the exemption in a very narrow way, so that non-member spouses can get court orders enforced against personal property on reserves for the sole purpose of enforcing a matrimonial property order or a domestic contract would likely still be extremely controversial in the First Nations community. It would likely raise other policy issues such as whether other orders such as support orders should be capable of enforcement by non-member spouses against personal property on reserves. This again demonstrates the difficulty of drawing a bright line between a single sectoral initiative and the many other important public policy issues it is linked to. A preferred option respecting s. 89 would be to recognize the jurisdiction of First Nations to deal with this issue in a manner similar to the jurisdiction recognized in regard to the Westbank First Nation in their self-government agreement under s. 103 (c) to exercise jurisdiction over the encumbering of property interests in their lands, "*including rules affecting the exemption in section 89 of the Indian Act".*

Ensuring Human Rights Protections

274 I am recommending stand-alone legislation, not amendments that would sit in the middle of the *Indian Act* for a variety of reasons. This recommendation would necessarily mean that the *Canadian Human Rights Act* would fully apply, and that the current s. 67 exemption under the CHRA for *Indian Act* decisions, would not. Nevertheless, there is an outstanding issue about whether the CHRA should have an interpretive clause in its application to First Nation governments in order to properly take aboriginal and treaty rights and other collective rights (e.g. to land) into account. Discussion of

[59] Note that the term "Indian" for the purpose of this section includes band members who do not have status under s. 6 of the Act – s. 4.1.

this issue with First Nations and First Nation organizations is a necessary part of working on reconciliation and respecting a balance between individual and collective rights.

275 I have also taken note of the recent trend in recent self-government agreements[60] to provide processes for dealing with any findings by international human rights bodies that a First Nation law is not consistent with any of Canada's international legal obligations. It would be difficult to translate such agreement provisions into a national legislative context. Such a proposal would naturally raise the question of what process there should be domestically for Canada to resolve findings against it that its laws as they affect indigenous peoples in Canada are not compliant with applicable international human rights standards. As this large policy question is outside my mandate, I have not addressed the issue.

Linkages to Wills and Estates

276 In several but not all jurisdictions (off reserves) the death of a spouse enables the surviving spouse to apply for his or her share of matrimonial property under provincial matrimonial property law rather than provincial wills and estates law.

277 There are many First Nation people who feel strongly that the death of spouse should trigger some entitlement to matrimonial real property. Some feel that at a minimum, there should be a provision in the new legislation providing that a surviving spouse who commenced a matrimonial real property action before their spouse died, should be able to proceed.

278 While I understand how important property matters are for surviving spouses, the difficulty in the present process is there is no recommendation I can make (including the one described above) that would not have significant and possibly unanticipated consequences for the existing wills and estates provisions of the *Indian Act*. These provisions themselves require a comprehensive review on the scale of the current process relating to matrimonial real property. The provisions of the *Indian Act* governing what happens when an "Indian" on a reserve dies without a will (intestate) provide various schemes for dividing property, real and personal, between a surviving spouse and any surviving children or other heirs. Attempting to craft matrimonial real property provisions that would interact in a coherent way with these provisions would require careful consideration and a consultation process designed for this purpose. More importantly, there is a need to develop a process that will provide opportunities for First Nations to move more quickly than they can now towards First Nation jurisdiction in all areas affecting the property and civil rights of First Nation people. Recognition of First Nation jurisdiction in this and other areas in a way that respects section 35 rights is the only way to finally ensure First Nations governments have the respect and recognition to develop a coherent set of laws in areas that inevitably interact with one another.

Non-legislative Recommendations

279 The viability and effectiveness of any legislative framework will depend on the necessary financial resources being made available. Without this commitment from the federal government, the law will simply not be accessible to the vast majority of First Nation people. Resources are obviously needed for First Nations to be able to develop proposed laws and consult with their citizens on this complex issue. Without them, the interim federal rules will prevail by default. This would undermine any claim to good faith in enacting legislation that recognizes First Nation jurisdiction.

280 It must be recognized that the best hope for enforcement is at the local level. This means there must be resources available to ensure that First Nations can begin filling the gap in the administration of justice respecting matrimonial real property by establishing, or further developing existing, dispute resolution mechanisms from mediation, elders councils to tribunals as required. It bears repeating that because the existing gap respecting the enforcement of laws on reserves is much bigger than

[60] (E.g. s. 36 of the Westbank First Nation Self-Government Agreement, Labrador Inuit Final Agreement and the Tlicho Final Agreement)

that off reserves, there is a great need to move on access to justice initiatives in family law with a sense of urgency and immediacy.

281 It must also be recognized that an effective regime governing matrimonial real property presumes the existence of a coherent functioning land regime that reflects the values, and meets the needs, of the citizens it is intended to serve. For many reserve communities, there are many incoherencies and anomalies in reserve land management. This is not a reflection on the competency of First Nation governments but rather results from a century of First Nations having to cope simultaneously with an imposed system of land management from the *Indian Act* and the lack of recognition of First Nation legal traditions and cultural values in relation to land and families. The fact that First Nation legal and cultural norms in relation to land and family matters have not been properly recognized by the larger legal system does not mean they do not operate or continue to have social and governance impacts within those communities. In short, the combination of imposed laws from the outside and non-recognition of still operating First Nation legal and cultural traditions produces a challenging environment in which to launch an initiative to protect matrimonial real property rights.

282 While there are existing programs aimed at supporting First Nations in the transition from the *Indian Act* to the exercise of inherent jurisdiction, these appear to be under-resourced relative to both need and interest by First Nations.

283 The First Nations Land Management Act (FNLMA) will likely continue to serve as a useful interim step on the road to a fuller expression of self-government. This Act recognizes the authority of First Nations to develop their own land codes from the ground up as well as matrimonial real property laws, and to recognize, create and determine legal interests in land. FNLMA First Nations can maintain a CP system, formally recognize custom allotments, or choose some other alternative that suits their people. Interest in participating in this First Nations initiative is greater than the resources available. There are initiatives in addition to FNLMA aimed at increasing land management capacity and training of First Nation government staff to assume more authority over land management matters – the Regional Lands Administrative Program (RLAP), Reserve Land and Environment Management Program (RLEMP), 53/60 Delegated Authority Programs (named for the sections of the *Indian Act* which authorize delegation of Ministerial authority in this area). There are very early research efforts to look at options for modernizing land registry systems. All of these initiatives and programs require coordination and as much support as required to meet First Nations interests in them. I recommend that INAC conduct an evaluation of these programs and assess any shortfall in resources to meet demand and what would be required to fill it. In my view, programs such as these provide a starting point to support the work that needs to be done in the communities by community members if properly resourced.

284 In addition to these measures, the three parties expressed interest in many other options to support legislative action. Some of these are listed below. A fuller picture of the field of non-legislative options put forward by the parties, can be seen from a review of their reports.

Implementation

1) Programs to address First Nation priorities respecting reserve land registry issues; and
2) Forums and mechanisms created by Chiefs that ensure the equal representation of women and men in the development, implementation and evaluation of community-based solutions respecting matrimonial real property on reserves.

Funding

3) Compensation for the lack of protections women and their descendants experienced under the *Indian Act* as a result of MRP;
4) Programs specifically for women following marriage breakdown for education, training, economic development, and small business development with no eligibility barriers;
5) Spousal compensation loan fund to address the fact that few couples on reserves will have sufficient equity in their homes to make a division of assets feasible, much less an expensive court action to achieve division; chronic housing shortages affect the ability of

spouses to comply with compensation orders; loans could be granted to band members on reserves who are in the process of divorcing their spouses for their fair share of the family home and any certificates of possession or custom allotments acquired by the couple during their marriage;
6) On-reserve housing loan fund to assist First Nation people in building own homes to assist in addressing the current housing backlog; and
7) Provide additional resources for education and upgrading training to increase employability of Aboriginal women to enable them to rebuild their families, communities and nations including the need to change eligibility requirements such as restrictive funding age limits.

Building on Existing Programs and Policies

8) Gender-based impact analysis of the Aboriginal Healing Foundation and healing and wellness programs be resourced for improved effectiveness for Aboriginal women, children and families;
9) Encourage First Nations to be explore the potential of their housing policies to respond to some aspects of matrimonial real property on reserves such as policies to deal with new family formation due to marital breakdown and the treatment of non-member spouses; and
10) Increase access to self-government negotiation processes and continue discussions regarding the need to review current policy and funding frameworks for the negotiation of self-government.

Accessibility of Supports

11) Ensure that Aboriginal women can access programs and supports both on and off reserves, including those living in semi-remote, remote and isolated communities;
12) Increase funding for women's shelters and INAC Family Prevention Program (currently there are 35 shelters for 633 First Nations);
13) Treatment facilities so treatment is available to prevent marital breakdown; and
14) Members who find themselves off the reserve as a result of marital breakdown should be able to access dispute resolution mechanisms on reserves as well as off.

Violence

15) Establishment of an effective national strategy to stop violence against Aboriginal women, children and families that engages the First Nation leadership and includes education for men on issues relating to violence and its impact on women and children;
16) Increased transitional housing for women, children and families;
17) Provide family/community intervention to break the cycle of addiction in First Nation communities;
18) Subsidized and affordable housing be provided in safe and healthy communities;
19) Impact assessment to evaluate the impacts and gaps of existing programs and services which address violence, including shelters and transition houses and to provide additional resources where needed; and
20) Provide transitional housing for men.

Justice

21) Enable communities to develop culturally-relevant approach to resolving conflict;
22) Improve access for Aboriginal women to judicial processes, which should take into consideration the unique needs of semi-remote, remote and isolated communities;
23) Development of multi-staged systems of Aboriginal mediation or other appropriate Aboriginal systems and practices for justice/decision making under matrimonial real property;
24) Assessment and evaluation of the impact of matrimonial real property measures implemented under *First Nations Land Management Act*;
25) Video court for remote communities;

26) Family law legal aid fund – funded by federal government to First Nation spouses in financial need to seek orders in respect of matrimonial real property interests on reserves upon separation or divorce;
27) Education and sensitivity training for professionals in the provincial policy and justice systems is needed to increase culturally-relevant access to Aboriginal justice and reduce discrimination in courts;
28) Legal professionals and the justice system receive training regarding on-reserve Aboriginal rights issues;
29) The creation of independent First Nation circuit courts or Elder's Circle;
30) Policing, alternative or traditional dispute resolution mechanisms (such as mediation);
31) Restorative justice model such as traditional approaches to justice that focuses on the problem and the solution;
32) Enforced mediation that is governed by bands to ensure a fair split of MRP, including a division of the worth of the home;
33) Implementation of a community-based, culturally appropriate Aboriginal conflict or dispute resolution by First Nation communities;
34) Alternative Dispute Resolution including First Nation traditional mediation programs;
35) Independent and accountable tribunal bodies determining MRP issues that would:
    a) Create checks & balances for Chiefs and Councils;
    b) Help resolve practical, everyday disputes;
    c) Act as an appeal process; and
    d) Outline minimum criteria to ensure protection of rights and equality of all parties involved.

Communication and Public Education

36) Ensure education on new concepts with respect to matrimonial real property are part of information packages going out to communities after action is taken on the Ministerial Representative's report.

Next Steps

285 This project must be part of the larger ongoing process of reconciliation. The parties to this process are in transition in their relationships to each other. First Nations are in transition as they move away from the deficiencies of the *Indian Act* while maintaining control over the process of change, over the process of nation-building and preserving the principle of non-alienation and the collective interest in the land. And there is work to do within First Nations communities, and with the federal government, to address the needs of all First Nation citizens.

286 The development of an implementation plan including a costing exercise of the resources required for implementation would also benefit from the participation of both organizations. The continued involvement of AFN and NWAC in next steps is seen by them as a necessary requirement of the government's commitment to an open and transparent process.

287 A broad policy framework to manage the process of change is needed; one that is premised on two fundamental principles:
1) Federal policies and legislative initiatives are to be based on a recognition of First Nation jurisdiction and respect for aboriginal and treaty rights; and
2) Both federal and First Nation governments have obligations to respect and implement internationally recognized human rights values.

288 Over the medium term, you may wish to consider discussions within the broad policy framework of a larger project to recognize inherent jurisdiction of First Nations over "property and civil rights" in regard to their citizens as a possible interim step in a larger plan to move away from the *Indian Act*.

289 Considerable work has been undertaken throughout this process to develop ideas about what matrimonial real property rights and remedies are needed and how to meet these needs. Likewise

considerable discussion took place about the assessment of any potential impact on aboriginal and treaty rights. That work can only be completed after specific legislative provisions are available to assess the treatment of both individual and collective interests and their relationship to the *Indian Act* and finally to section 35 rights. This work is best undertaken with the involvement of both NWAC and the AFN, as both organizations have maintained throughout the process. The legislative drafting would no doubt benefit from their input.

290 As is obvious from this report, the complexity of both meeting matrimonial real property interests and the honour of the Crown is a delicate and complex task, in which the "devil" is very much in the details. I believe it is time to move on the issue of matrimonial real property, while developing an agenda of reconciliation to break the start-and-stop pattern of joint initiatives between First Nations and Canada.

VIII. Summary of Conclusions and Recommendations

The following is a summary of conclusions and recommendations made throughout my report. Paragraph numbers as they appear in the main body of the report are listed in brackets at the end.

I. Themes

1. The following key themes that arose throughout the matrimonial real property process can be used as a guide in the development of legislative and non-legislative options:
   1) *Access to Justice and related Programs & Services;*
   2) *Concerns about the Adequacy of the Consultation Process;*
   3) *Fundamental Human Rights;*
   4) *Housing;*
   5) *Importance of Traditional Values, Practices, Knowledge Systems and Laws;*
   6) *Interests and Well-being of Children;*
   7) *Membership and Indian Status Issues;*
   8) *Protection of First Nations Lands;*
   9) *Resources and Capacity to Implement Solutions;*
   10) *Respect for Aboriginal and Treaty Rights, Agreements and First Nation Laws;*
   11) *Solutions must be Developed and Implemented by Communities, for Communities;*
   12) *The Lack of MRP Protections is not an Isolated Issue; Solutions cannot be Isolated to MRP;*
   13) *Violence; and*
   14) *Women Must Have a Stronger Voice in their Communities.* (*Paragraphs 26-40)*

2. The promotion of relationship building and understanding within First Nation communities will depend on the steps taken by Canada following this consensus building exercise. The further the project advances towards law, the more anxious the respective parties will become about ensuring their interests and objectives are met in the final product. There will be a need for ongoing discussions to build on the good work achieved through this process, rather than assuming that joint work is completed. (*Paragraph 46)*

II. Matrimonial Real Property on Reserves: Context and Concepts

3. There is an urgent need for short-term measures to address dispute resolution needs and other administration of justice issues such as enforcement of court orders and First Nation laws. These points were emphasized by First Nation people throughout the consultation and dialogue sessions. (*Paragraph 72)*

4. If First Nation governments are to be looked to, to provide rights and remedies comparable to those available under provincial and territorial laws, while taking into account the distinct nature of the land regime in First Nation communities, there must be a comparable scope of recognized jurisdiction, resources, capacity and institutional development. Otherwise First Nations would be placed in a catch-22 situation – they would be held to the same standard as provincial governments but not have the resources and capacity to achieve it. (*Paragraph 73)*

5. It seems clear that a broad policy framework to manage the process of change is needed; one that is premised on two fundamental principles:
   1) Federal policies and legislative initiatives are to be based on a recognition of First Nation jurisdiction and respect for aboriginal and treaty rights;
   2) Both federal and First Nation governments have obligations to respect and implement internationally-recognized human rights values. (*Paragraph 99)*

6. In the case of matrimonial real property as this report will show, there are a large number of unresolved issues vital to achieving a comprehensive matrimonial property regime but which cannot be addressed through a sectoral initiative alone – issues relating to land management, land registries,

wills and estates, administration of justice, self-government, First Nation citizenship, support and custody issues to name a few. Among lessons learned in this process, is the need to ensure sufficient time to examine and discuss with First Nations any future proposal for legislative action. (*Paragraph 100)*

III. Legal and Social Context of Landholding and Housing Arrangements on Reserves

7. Any practical and helpful response to matrimonial real property issues on reserves will require factoring in the various ways individual members of First Nations occupy homes on reserve lands within and outside the provisions of the *Indian Act*. There is considerable diversity in these situations and diversity in the degree to which they manifest themselves on different reserves. (*Paragraph 135)*

IV. Consultation Issues

8. In regard to federal Options 1 and 2 (as described in INAC consultation documents) it became very clear, very early in the process that any option involving the incorporation of provincial laws of general application respecting matrimonial real property matters was considered unacceptable for a number of reasons. Some relate to aboriginal and treaty rights. Others of equal magnitude relate to the impracticability of applying provincial laws to a distinctly different land regime and social situations for which those laws were not designed. These concerns have been supported by the conclusions of two independent legal analyses prepared for my consideration. (*Paragraph 154)*

9. Regarding federal Options 2 and 3, delegated powers would not be acceptable. First Nations are looking for a clear recognition of First Nations' jurisdiction. It became clear that a modified Option 3 or an alternative to it, are the only viable possibilities. (*Paragraph 156)*

10. It should be noted that the section 35 rights of aboriginal peoples and the fiduciary obligations of the Crown in respect of those rights may require a special treatment of confidentiality in an aboriginal policy or legal context. (*Paragraph 168)*

11. The implications of *Samson Indian Band and Nation* v. *Canada* for consultations generally and with respect to ongoing discussions and analysis concerning matrimonial real property should be considered from a legal and policy viewpoint. (*Paragraph 169)*

12. Based on the consultation concerns raised during the process, there are a number of questions that I suggest require some further consideration:
    1) The question arises whether there is an obligation on the part of the Crown to attempt to resolve disputes relating to the existence of a duty to consult either through mediation or by resorting to the courts before continuing to pursue the action being questioned (See *Haida* and *Musqueam Indian Band* v. *Richmond*).
    2) Given that the Crown is considered to have constructive notice of section 35 treaties, does case law such as *Mikisew* and *Dene Tha* have implications for the current MRP consultation process? For example, is there a right to direct consultation with such Treaty Nations?
    3) If the onus to initiate consultation is on the Crown and if First Nations have a duty to reciprocate, what is the appropriate course of action where a First Nation receives notice of a meeting, is willing to participate in consultation but for other reasons cannot attend? What is sufficient to meet the Crown's duties?
    4) *Dene Tha* and other cases suggest that where there is a legal duty to consult with a First Nation, the government cannot avoid properly fulfilling a duty to consult by saying it was in a hurry or had a tight timeline – in this process we do not yet know how many First Nations received notice of the AFN regional sessions for example, and how many were able to attend. (*Paragraph 181)*

13. I recommend that efforts be made to address the large gap in federal policy in regard to consultations as soon as possible. This includes developing a companion set of practices and procedures for

monitoring, recording and assessing concerns about consultations made by First Nation representatives throughout the process. (*Paragraph 184)*

VII. Conclusions and Recommendations

14. You may wish to seek advice on how direction from the Court in *R* v. *Adams* may apply to any legislative proposal and draft legislation that emerges from decision-making on the issue of matrimonial real property, and whether the legislative framework I have set out assists in that regard. (*Paragraph 219)*

15. If there is a duty to consult that requires further consultation and accommodation, I recommend the inclusion of a provision in the legislation providing for a documented consultation process to take place prior to an Order-in-Council bringing into force any Bill for any given First Nation. This proposed procedure is modeled after that used for enabling legislation like the FNLMA and the *First Nations Commercial and Industrial Development Act* (FNCIDA). In each of these cases, the legislation only comes into force for a particular First Nation upon the adoption of an Order-in-Council. A modified version of this option would allow legislation to be developed and passed by Parliament while providing a means to ensure that the Crown fulfills any remaining or specific legal duty to consult that it may owe to any specific First Nation whether as a treaty or aboriginal right. It would allow the government to fill in any gaps in consultation before legislation applies to a given First Nation. This need not be a lengthy process; it could be carried out through regional offices through a combination of correspondence and meetings and would provide a clear record on consultation with each First Nation. This would not prevent the ultimate application of federal legislation, rather it would remove any possible legal vulnerability on the duty to consult and would also fulfill a public legal education process that both the AFN and NWAC feel are very much in need. A provision allowing for the modification of the application of the legislation by Order-in-Council and/or agreement with a given First Nation would provide the flexibility to make adjustments as required (again like FNCIDA). If Parliament agrees to this, there will be no question of the government trenching on Parliamentary privilege. (*Paragraph 220)*

16. The Constitution of Canada is the supreme law of Canada. Accordingly, Section 35 rights should be accorded the same degree of respect as Charter rights in the protocols for reviewing draft Bills prior to their introduction to Parliament. I recommend that in addition to a Charter rights analysis, the Crown undertake a section 35 analysis, including section 35(4), of any proposed legislation prior to the introduction to Parliament of a Bill on matrimonial real property. In other words, the Department of Justice should be asked to confirm the compliance of the legislation with both the Charter and section 35 of the *Constitution Act, 1982*. Necessary elements of this task would include 1) an identification of the many provisions of the *Indian Act* which protect the collective interests and aboriginal title of First Nations in their reserve lands; 2) an analysis of the role these *Indian Act* provisions currently play in protecting section 35 interests in reserve lands such as aboriginal title; 3) ensuring there is no negative impact on such rights flowing from any proposed provisions by analyzing the relationship between the *Indian Act* and the proposed new legislative provisions. All of these steps may be required to ensure a full picture of the risk of any potential infringement and how to deal with any such risk. (*Paragraph 221)*

17. I recommend joint work between yourself and the Minister of Justice to develop guidelines for INAC and Justice in their work together to nourish a culture of section 35 compliance and to ensure that legislative initiatives are properly vetted in regard to section 35 compliance. Policy guidelines and directives such as the following could be developed to ensure the constitutionally protected rights in section 35 of the *Constitution Act, 1982* are treated with the same respect for the rule of law and that is accorded the Charter of Rights and Freedoms.
    1) Certifying that every proposed law and policy comports with section 35 of the *Constitution Act, 1982* and the fiduciary duties of the Crown
    2) Counselling departments and agencies of government of Canada's fidelity to section 35, creating a culture of respect in Government for aboriginal and treaty rights
    3) Promoting compliance with international legal obligations in relation to First Nations

4) Directing that Canada's interventions before the courts comport with section 35
5) Parliamentary/public role – promoting awareness of section 35 aboriginal and treaty rights. (*Paragraph 222)*

18. The Department should develop, as soon as possible, specific policies and procedures relating to consultation in order to ensure that future consultation activities can identify and discharge any legal duty to consult while also fufilling objectives of good governance and public policy by:
    1) Ensuring First Nations have relevant information to the issues for decision in a timely manner;
    2) Providing an opportunity for First Nations to express their concerns and views on potential impacts of the legislative proposal and issues relating to the existence of a duty to consult;
    3) Listening to, analyzing and seriously considering the representations and concerns of First Nations in the context of relevant legal and policy principles including their relationship to other constitutional and human rights principles;
    4) Ensuring proper analyses by the Department of Justice of section 35 issues relating to any proposed legislative initiative are thoroughly canvassed before, during and after consultations;
    5) Seriously considering proposals for mitigating potentially negative impacts on aboriginal and treaty rights or other rights and interests of First Nations and making necessary accommodations by changing the government's proposal
    6) Establishing, in consultation with First Nations, a protocol for the development of legislative proposals. (*Paragraph 224)*

19. The diverse laws, policies, and legal traditions of First Nations are reflected in the approaches taken by them to allotment of housing, to land and to family relationships. The diverse experience and responses of First Nations to the process of colonization are also reflected in their contemporary laws and policies. Accommodating and respecting this diversity must be an element of any legislative initiative respecting matrimonial real property on reserves. (*Paragraph 225)*

20. A layer of legal complexity and diversity coming from outside First Nations communities are matrimonial property laws of general application that now apply to a limited extent to reserve communities. This will require rules to promote harmonization of jurisdiction (both in respect to First Nation jurisdiction and federal jurisdiction) over matrimonial real property with the diverse policy choices provincial governments have made respecting the balance of matrimonial property interests. An area of key concern in this regard is the diverse treatment of common-law relationships by provinces and territories, as well as definitions of what constitutes matrimonial property. (*Paragraph 228*)

21. Overall, the result is a legal, social and cultural situation that has no parallel off reserves. This in turn compels the conclusion that as much as possible, decision-making power in the design of matrimonial real property laws applicable on reserves must be left to each individual First Nation. This also means attempting a wholesale transfer of provincial-type rights and remedies to a reserve context would not work. (*Paragraph 229)*

22. Throughout the consultation and consensus-seeking phases, it seems clear that Federal options 1 and 2 listed in the INAC consultation documents were considered to constitute infringements that are not justifiable as well as posing too many practical problems in terms of harmonization and conflict of laws. This is a view supported by several of the provincial governments, the AFN, NWAC and the independent legal analyses I commissioned. (*Paragraph 233)*

23. The basic scheme of the Act would be a concurrent jurisdiction model with paramountcy of First Nations law where there is inconsistency or conflict with either federal or provincial law with respect to matrimonial property. In this regard, the maximum scope of lawmaking responsibility should be left to First Nations' jurisdiction and federal activity should be as minimal as required to meet human rights concerns. (*Paragraph 234*)

24. A possible title for the legislation might be "*A Law respecting First Nations, Matrimonial Real Property and Dispute Resolution*". (*Paragraph 235)*

25. The proposed legislation would consist of two parts. Part 1 adopts a rights-recognition approach to the issue of matrimonial real property and First Nations' jurisdiction. This is not only desirable as a matter of principle but should be considered as a practical means for the federal government to recognize and affirm aboriginal and treaty rights, and to avoid infringement as much as possible. (*Paragraph 236)*

26. Parts 1 and 2 would be preceded by a Preamble setting out important principles providing context for the interpretation of the proposed legislation. As examples, such principles could include:
    1) The need to act in a manner consistent with fundamental human rights principles;
    2) The need to provide immediate interim federal measures to ensure protection for spousal interests in regard to matrimonial homes on reserves;
    3) Acknowledging the importance of the principle of reconciliation in respect to existing aboriginal and treaty rights and the sovereignty Crown;
    4) The desirability of recognizing First Nation jurisdiction over the determination of spousal interests in relation to the matrimonial home and other matters concerning matrimonial on reserves;
    5) The inherent right of self-government is a section 35 right;
    6) The need for cooperation and reconciliation between First Nations and the Crown on matters relating to matrimonial property on reserves;
    7) The equality of men and women;
    8) The importance of including women at all levels of decision-making as equals;
    9) The priority interests of children in determining matters relating to the spousal interests in the matrimonial home;
    10) The need to take into account the interests of other family members and First Nations' cultural interests. *(Paragraph 237)*

27. There will be a need for some general provisions. First, definitions of key terms such as: "child", "common law relationship", "dependent adult", "family", "First Nation governments", " First Nation reserve land", "immovable", "matrimonial home", "spouse", "real property", "violence". Second, there should be a "for greater certainty" provision confirming the continuing status of *Indian Act* reserve lands as "lands reserved for the Indians". The wording used in the *First Nations Land Management Act* may be of assistance. (*Paragraph 238)*

28. A general provision is required describing the applicability of the Act and excluding reserve lands to which the *First Nations Land Management Act* applies. In discussions with the participating First Nations who operate under the FNLMA, you may wish to consider whether any further reference is required in order to address any gap that may exist from the date a First Nation's land code comes into force and the adoption of a First Nation's matrimonial real property law pursuant to FNLMA. If such action is required or desirable, the consent of participating First Nations through amendment of the Framework Agreement on First Nation Land Management (as amended) would likely be required. (*Paragraph 239*)

29. The Act should apply to common law couples and couples married by custom, as well as persons married under provincial law. This can be achieved by providing a definition of the term "spouse" that is sufficiently broad. The *Indian Act* provides a definition of "common law partner" and of "survivor". Some careful consideration will need to be given to this issue in proposed legislation on matrimonial real property for the interim federal rules. First Nations are free to define terms in their own laws. *(Paragraph 239)*

30. John Borrows makes a number of very useful recommendations about the contents of a proposed *Federal Law-Indigenous Law Harmonization Act*. To me, his ideas speak to the notion of reconciliation that the Supreme Court of Canada has directed First Nations and Canada to engage in. I recommend that instructions to drafters of the legislation take into account this type of approach, with respect to issues of interpretation of proposed matrimonial real property legislation. (*Paragraph 241)*

31. A provision should be included to provide for a review of the Act and its implementation. Some suggested wording has been provided in my report. (*Paragraph 242)*

32. To ensure that the new law respecting matrimonial real property prevails in the event of any conflict or inconsistency with those laws of provincial application that do apply on reserves in respect to matrimonial property generally, a consequential amendment to s. 88 of the *Indian Act* may be needed. This change would simply add the name of the new legislation, as was done with the *First Nations Fiscal and Statistical Management Act*. (*Paragraph 243)*

33. Additional amendments to the provisions of the *Indian Act* dealing with interests held by Certificate of Possession may be required to ensure consistency with the new legislation. For example, provisions of the *Indian Act* relating to certificates of possession may require amendment to provide for registration of spouses of holders of certificates of possession. This would be for the purpose of providing notice of a spousal interest that may exist under the new law. The provisions respecting certificates of possession will require a close review for consistency, without infringing any collective interests or aboriginal or treaty right. (*Paragraph 244)*

34. Provisions relating to the recognition of First Nations' jurisdiction should be set out in Part 1 before the interim federal rules, in order to emphasize the paramountcy and preference for the operation of First Nations' jurisdiction in this area. The recognition of this inherent jurisdiction means it is concurrent with federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. This is a model familiar to modern claims and self-government agreements. There is much experience to draw on with respect to paramountcy clauses to ensure that federal, provincial and First Nations laws work together in this area to provide the protection needed by spouses on reserves. (*Paragraph 245)*

35. I have set out some sample drafting of recognition language in my report; language that must be complemented by preambular statements relating both to the inherent right of self-government as a section 35 right, and the importance of human rights and the equality of men and women. Under this proposal, First Nation jurisdiction over matrimonial real property would necessarily and incidentally include jurisdiction to establish local dispute resolution mechanisms. There are two reasons for this: the need for local, culturally relevant dispute resolution bodies and the inaccessibility of the existing court system for many First Nation people and communities due to remoteness, lack of financial resources and other factors. (*Paragraph 246)*

36. Part 2 of the proposed legislative framework would provide interim federal rules establishing protection for the short term until a First Nation had adopted its own law respecting matrimonial real property. I have suggested short-term remedies that would be available under this Part and a rationale for each. There are compelling human rights considerations to justify short-term federal action to ensure there is some immediate relief available for First Nation spouses pending the adoption of matrimonial real property laws for those First Nations who do not have them. Additional protection over the short term will be available through the exercise of First Nation jurisdiction consistent with Part 1 of the proposed legislation. (*Paragraph 247)*

37. While spouses are married, and particularly when there are children, each family member should have the security of being protected from having the matrimonial home sold from underneath them, regardless of which spouse or whether both spouses' names are on the legal documents relating to the home. Implementation would likely require some mechanism or mechanisms to provide for the registration of a spouse's name in the Indian Land Registry where applicable, and support for those First Nations who may want to establish a separate registry for homes alone regardless of whether they are located on CP-held land or general band lands. (*Paragraph 248)*

38. Remedies providing temporary exclusive possession of the matrimonial home are needed on reserves to deal with situations of crisis and to provide spouses time to stabilize their situation while making longer-term plans. Interim possession remedies present few if any difficulties in terms of

scope of potential infringement on collective interests precisely because of their temporary nature. These would include:

1) Interim exclusion orders to allow a spouse to have temporary exclusive possession of the matrimonial home in response to a crisis prompted by domestic violence (in some jurisdictions applications can be made by a spouse or a third party on behalf of the spouse in need of protection);
2) Interim exclusive possession orders available on application by a spouse upon separation and to also ensure a spouse with custody of children can provide shelter and stability. (*Paragraph 249)*

39. The diversity of First Nations' values and practices respecting interests in reserve land must be respected and a distinction acknowledged in the new legislation between the matrimonial home as an improvement on the land and an interest in reserve land itself. This means leaving remedies involving the transfer or forced sale of a spouse's interest in land to be determined by First Nations' jurisdiction under Part 1. (*Paragraph 250)*

40. I am recommending that the new legislation provide for the power of courts of competent jurisdiction, upon nullity, separation or divorce, to grant applications by spouses for compensation orders to divide the value of the matrimonial home. Only the structure of the home as an improvement would be taken into account in conducting an appraisal or valuation. This proposed provision should be worded in such a way that recognizes the contributions of spouses to the marital relationship and to matrimonial real property includes financial contributions as well as contributions in kind such as childrearing or other unpaid work in the home. (*Paragraph 251)*

41. There is a strong interest by both the AFN and NWAC in the establishment of a spousal loan compensation fund as a means of assisting spouses in the enforcement of compensation orders in relation to matrimonial real property on reserves. Again existing procedures with some necessary modification to recognize First Nations' jurisdiction instead of Ministerial discretion, perhaps could be examined and adapted in further discussions between INAC, AFN and NWAC on the feasibility of establishing a spousal loan compensation fund. (*Paragraph 257)*

42. It appears that every provincial and territorial jurisdiction has a similar provision but this should be confirmed by the Department of Justice as well as the question of their applicability to reserve lands as laws of general application that do not conflict with the *Indian Act*. If in fact, each jurisdiction has a similar provision that operates like the one at issue in *Derrickson*, then one option is to simply leave provincial law to operate as it does now. (*Paragraph 259)*

43. An alternative option would be to enact one federal provision providing this type of remedy on a national basis for spouses with matrimonial homes on CP-held land. It is not clear whether *Derrickson*-type orders are currently available to non-member spouses, and this should also be confirmed one way or the other by the Department of Justice. (*Paragraph* 260)

44. I am recommending that interim federal rules include a provision allowing for the court enforcement of domestic contracts entered into by spouses on reserves. You may wish to consider wording that is sufficiently broad to ensure enforcement of such agreements in their totality, as provisions in such agreements relating to matrimonial property may well be integrally tied to what the parties have agreed to in other areas such as support. This recommendation may require not only a provision in the proposed new legislation but consideration of relevant provisions of the federal *Divorce Act*. (*Paragraph* 262)

45. I recommend that the legislation provide courts power in applying interim federal rules some flexibility to fashion new interim remedies rather than limiting choices to existing provincial type remedies. This could allow First Nation diversity and legal traditions to be recognized and taken into account by the courts. It would provide for First Nation input into what remedies would work best in their communities. This could be achieved through the establishment of Friend of Court provision with

federal resources provided for its implementation and provisions confirming the standing of First Nations on such matters. (*Paragraph 263)*

46. However, court orders for transfer of a matrimonial home and orders for partition and sale are not recommended for inclusion in the interim federal rules. The variations among First Nations in their use of certificates of possession and custom allotments and their diverse views about whether individual First Nation members can possess any real property interest in the land itself means that respect for self-government principles should leave the determination of such issues and the availability of these remedies to First Nations' jurisdiction. These are issues First Nations can move on immediately given their concurrent jurisdiction over matrimonial real property. (*Paragraph 264)*

47. Under the interim federal rules, courts will require some direction in making decisions. Some of the typical criteria used in provincial laws are relevant to First Nations citizens as well, such as taking into account the interests of children or the presence of domestic violence. However, there will be a need for courts to consider criteria relevant to diverse First Nation communities. The legislation should enable evidence to be brought in of First Nations' particular social situations laws and policies and their specific practices relating to clan ownership of clan property. An example of criteria developed specifically for a First Nation context can be found in section 8 of the *Westbank First Nation Family Property Law* which also includes criteria typical of provincial laws. However, caution must be exercised in looking at precedents like Westbank. What works for one First Nation cannot be assumed to work for another. Provisions for a Friend of the Court mechanism and for standing by the affected First Nation would be of assistance in getting such evidence before the court, where the existing court system is being relied on. (*Paragraph 265)*

48. It will be necessary to move quickly under Part 1 to recognize the jurisdiction of First Nations over dispute resolution in this area and to provide resources to First Nation communities to establish local dispute resolution bodies, or to aggregate in the formation of regional bodies, if they so choose. I also recommend that discussions be held with the Department of Justice to incorporate this element into an action plan for renewal of the Aboriginal Justice Strategy. This is another reason to examine the notion of a First Nations-Federal Harmonization Act. (*Paragraph 267)*

49. I also recommend ensuring that the recognition of the lawmaking authority of First Nations include a recognized power to allow decisions of local dispute resolution bodies to be capable of enforcement as an order of a provincial or superior court. (This would likely require discussions between interested First Nations and provincial governments). (*Paragraph 268)*

50. Innovative ways of using the existing court system at all levels should be explored as speedily as possible. Every effort should be made to work through these challenges and find mechanisms to ensure that justice is available at the community level on this matter over the short term. For example, any possibility of using justices of the peace, provincial courts or new First Nation family courts for the purpose of making the orders proposed by Part 2 should be examined. Another avenue to explore may be the establishment of federal justices of the peace from the First Nation community to deal with family law matters. Such a measure could provide a vehicle for the enforcement of both the interim federal rules and First Nation laws, if First Nations so chose. (*Paragraph 269)*

51. A preferred option respecting s. 89 would be to recognize the jurisdiction of First Nations to deal with this issue in a manner similar to the jurisdiction recognized in regard to the Westbank First Nation in their self-government agreement under s. 103 (c) to exercise jurisdiction over the encumbering of property interests in their lands, "*including rules affecting the exemption in section 89 of the Indian Act".* (*Paragraph 273)*

52. I am recommending stand-alone legislation, not amendments that would sit in the middle of the *Indian Act.* This recommendation would necessarily mean that the *Canadian Human Rights Act* would fully apply, and that the current s. 67 exemption under the CHRA for *Indian Act* decisions, would not. Nevertheless, there is an outstanding issue about whether the CHRA should have an interpretive clause in its application to First Nation governments in order to properly take aboriginal and treaty

rights and other collective rights (e.g. to land) into account. Discussion of this issue with First Nations and First Nation organizations is a necessary part of working on reconciliation and respecting a balance between individual and collective rights. (*Paragraph 274)*

53. Attempting to craft matrimonial real property provisions that would interact in a coherent way with these provisions would require careful consideration and a consultation process designed for this purpose. More importantly, there is a need to develop a process that will provide opportunities for First Nations to move more quickly than they can now towards First Nation jurisdiction in all areas affecting the property and civil rights of First Nation people. Recognition of First Nation jurisdiction in this and other areas in a way that respects section 35 rights is the only way to finally ensure First Nations governments have the respect and recognition to develop a coherent set of laws in areas that inevitably interact with one another. (*Paragraph 278)*

54. The viability and effectiveness of any legislative framework will depend on the necessary financial resources being made available. Without this commitment from the federal government, the law will simply not be accessible to the vast majority of First Nation people. Resources are obviously needed for First Nations to be able to develop and consult with their citizens on this complex issue. Without them, the interim federal rules will prevail by default. This would undermine any claim to good faith in enacting legislation that recognizes First Nation jurisdiction. (*Paragraph 279)*

55. It must also be recognized that the best hope for enforcement is at the local level. This means there must be resources available to ensure that First Nations can begin filling the gap in the administration of justice respecting matrimonial real property by establishing, or further developing existing, dispute resolution mechanisms from mediation, elders councils to tribunals as required. It bears repeating that because the existing gap respecting the enforcement of laws on reserves is much bigger than that off reserves, there is a great need to move on access to justice initiatives in family law with a sense of urgency and immediacy. (*Paragraph 280)*

56. It must also be recognized that an effective regime governing matrimonial real property presumes the existence of a coherent functioning land regime that reflects the values, and meets the needs, of the citizens it is intended to serve. (*Paragraph 281)*

57. While there are existing programs aimed at supporting First Nations in the transition from the *Indian Act* to the exercise of inherent jurisdiction, these appear to be under-resourced relative to both need and interest by First Nations. (*Paragraph 282)*

58. FNLMA First Nations can maintain a CP system, formally recognize custom allotments, or choose some other alternative that suits their people. Interest in participating in this First Nation initiative is greater than the resources available. There are initiatives in addition to FNLMA aimed at increasing land management capacity and training of First Nation government staff to assume more authority over land management matters – the Regional Lands Administrative Program (RLAP), Reserve Land and Environment Management Program (RLEMP), 53/60 Delegated Authority Programs (named for the sections of the *Indian Act* which authorize delegation of Ministerial authority in this area). There are very early research efforts to look at options for modernizing land registry systems. All of these initiatives and programs require coordination and as much support as required to meet First Nations interests in them. I recommend that INAC conduct an evaluation of these programs and assess any shortfall in resources to meet demand and what would be required to fill it. In my view, programs such as these provide a starting point to support the work that needs to be done in the communities by community members if properly resourced. (*Paragraph 283)*

59. In addition to these measures, the three parties expressed interest in many other options to support legislative action. Some of these are listed below. A fuller picture of the field of non-legislative options put forward by the parties, can be seen from a review of their reports. (*Paragraph 284*)

60. This project must be part of the larger ongoing process of reconciliation. The parties to this process are in transition in their relationships to each other. First Nations are in transition as they move away

from the deficiencies of the *Indian Act* while maintaining control over the process of change, over the process of nation-building and preserving the principle of non-alienation and the collective interest in the land. And there is work to do within First Nations communities, and with the federal government, to address the needs of all First Nation citizens. (*Paragraph 285)*

61. The development of an implementation plan including a costing exercise of the resources required for implementation would also benefit from the participation of both organizations. The continued involvement of AFN and NWAC in next steps is seen by them as a necessary requirement of the government's commitment to an open and transparent process. (*Paragraph 286)*

62. A broad policy framework to manage the process of change is needed; one that is premised on two fundamental principles:
    - Federal policies and legislative initiatives are to be based on a recognition of First Nation jurisdiction and respect for aboriginal and treaty rights;
    - Both federal and First Nation governments have obligations to respect and implement internationally recognized human rights values. (*Paragraph 287)*

63. Over the medium term, you may wish to consider discussions within the broad policy framework of a larger project to recognize inherent jurisdiction of First Nations over "property and civil rights" in regard to their citizens as a possible interim step in a larger plan to move away from the *Indian Act*. (*Paragraph 288)*

64. Considerable work has been undertaken throughout this process to develop ideas about what matrimonial real property rights and remedies are needed and how to meet these needs. Likewise considerable discussion took place about the assessment of any potential impact on aboriginal and treaty rights. That work can only be completed after specific legislative provisions are available to assess the treatment of both individual and collective interests and their relationship to the *Indian Act* and finally to section 35 rights. This work is best undertaken with the involvement of both NWAC and the AFN, as both organizations have maintained throughout the process. The legislative drafting would no doubt benefit from their input. (*Paragraph 289)*

Appendix A

Mandate of Ministerial Representative
Matrimonial Real Property On Reserves

20 July 2006

Matrimonial Real Property On Reserves
Summary of Mandate of Ministerial Representative

The Ministerial Representative has been asked to ensure that a viable legislative solution for addressing the issue of on-reserve matrimonial real property (MRP) is recommended to the Minister at the conclusion of the consultation process (Spring 2007).

Objectives:

1. To ensure appropriate consultations on the issue of MRP, including conformity to *Haida* case law principles[1] and concerns with the consultation process and how best to facilitate a process that includes the AFN, NWAC and INAC.

2. To identify the best viable legislative solution to ensure that:

    - First Nations women's rights are considered and the Canadian Charter of Rights and Freedoms and human rights are respected;
    - There is harmonization with provincial/territorial legislation (as required)
    - There is an acceptable balance between individual equality rights guaranteed by ss. 15 and 28 of the Charter and collective rights recognized in s. 35 of the *Constitution Act, 1982* and referenced in s. 25 of the Charter.

Activities

The Ministerial Representative is:

- to work closely and meet regularly with INAC, AFN & NWAC

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[1] The following principles developed from Haida are to help guide consultations, to ensure that the Government of Canada engages in effective and efficient consultations with Aboriginal peoples:

- Reconciliation: Consultation with Aboriginal peoples, guided by the overarching principle of reconciliation, will be grounded in the honour of the Crown, the renewal of the relationship between the Crown and Aboriginal peoples and the balancing of Aboriginal and non-Aboriginal interests.
- Shared Commitment: Consultation will be based on a commitment to cultivate a climate of good faith, mutual respect, reciprocal responsibility, and efficiency.
- Sound Decision Making: The consultation process will ensure that the results of meaningful consultation are sustainable.
- Transparency: Effective and efficient consultations must be timely, accessible, inclusive of all potential stakeholders, and be based on clear, open, two-way communication, and accountability.

- to meet with all parties during the planning phase to develop a clear and transparent process that will include establishing reporting mechanisms, deliverables, goals, timeframes and principles
- to attend as many consultation sessions as possible (led by the three parties)
- to develop a final report on the process to be presented to the Minister
- to liaise between INAC, AFN & NWAC
- to facilitate consultation sessions, during the consultation phase, between INAC, AFN & NWAC on a monthly basis and provide advice to the parties
- to facilitate the consultation process and be involved in its three phases – planning, consultation and consensus-building
- during the consensus-building phase, to assist the parties to negotiate a consensus to ensure the issue of MRP is resolved
- if no consensus is reached by the parties, to recommend a solution which will conform to human rights considerations, abide by basic principles set out in *Haida* case law and be in harmony with provincial/territorial legislation (as required).

Final Report

The final report of the Ministerial Representative shall include:

- a record of public consultations
- copies of all written submissions and any documents collected and analyzed
- a description of the issues[2] that relate to MRP that negatively impact on the rights of First Nation women and that must be addressed in a legislative solution to MRP
- a description of the different land allotment and custom systems and current policies currently in use by First Nations and how they will be impacted by a policy or legislative solution
- a summary of solutions proposed by participants
- the Representative's analysis of the issues discussed and clear recommendations for action including but not limited to amendments to the Indian Act, its regulations or the development of new legislation or policies
- an annex that will contain a chronology of meetings, a list of written submissions received, a list of participants at the consultation meetings and the number of in-camera testimonies received if applicable.

[2] Such issues may include, for example, the enforcement of any MRP law, remedies to address situations of emergency (i.e., domestic violence), management of reserve lands and entitlement of surviving spouses and children to remain in the family home, etc.

Appendix B

Final Reports

Assembly of First Nations
Indian Affairs and Northern Development
Native Women's Association of Canada

MATRIMONIAL REAL PROPERTY ON RESERVES: OUR LAND, OUR FAMILIES, OUR SOLUTIONS

MARCH 2007

FINAL REPORT ON AFN REGIONAL DIALOGUE SESSIONS

ASSEMBLY OF FIRST NATIONS

ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

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Chapter One: Executive Summary

1.0 INTRODUCTION

In accordance with the mandate set out in Resolution 32/2006, the AFN coordinated and co-hosted nation wide Regional Dialogue Sessions starting on November 16, 2006 in Saskatoon Saskatchewan and ending on January 19, 2007 in Hay River, NWT. This report sets out a summary of the direction provided to the AFN through the Regional Dialogue Sessions.

1.1 WITHOUT PREJUDICE

This report provides a synopsis of the general direction provided by the participants to the Regional Dialogue Sessions and is presented without prejudice to the views and positions of any particular First Nation and/or to the final report of the Assembly of First Nations.

1.2 METHODOLOGY

In accordance with the mandate set out in Resolution No. 32/2006, the AFN coordinated and co-hosted nation wide Regional Dialogue Sessions with participating provincial and territorial organizations starting November 16, 2006 in Saskatoon, Saskatchewan and ending January 19, 2007 in Hay River, NWT. The complete schedule of proceedings was as follows:

- Saskatoon, Saskatchewan: November 16-17, 2006
- Richmond, British Columbia: November 20-21, 2006
- Winnipeg, Manitoba: November 23-24, 2006
- Whitehorse, Yukon: November 24, 2006
- Halifax, Nova Scotia: November 30-December 1, 2006
- Quebec City, Quebec: December 13-14, 2006
- Edmonton, Alberta: January 17, 2007
- Hay River, NWT: January 19, 2007

The Chiefs of Ontario did not engage in the Regional Dialogue Sessions hosted by the AFN. Instead, they voiced their concerns with the Minister's nation-wide process through Chiefs of Ontario Resolution No. 06/08, which was passed in November 2006. The resolution called for the Minister's nation-wide process to be "stopped and restructured to create an appropriate process and time-frame."

At each session, the participants were provided with a package of material prepared by the AFN that included the following documents:

- A brochure to define what matrimonial real property means and highlight some of the issues and concerns expressed by the Chiefs-in-Assembly;
- A list of Frequently Asked Questions;
- A copy of the AFN Resolution No. 32/200
- A copy of the September 25, 2006 letter from National Chief Phil Fontaine to Minister Prentice to express the parameters of AFN's involvement in INAC's consultation process;
- A copy of Minister Prentice's November 1, 2006 reply to the National Chief; and
- A Regional Dialogue Session Resource Handbook setting out relevant background information to facilitate discussion and identify solutions.

INAC's representatives provided their own package of material to the participants that included a description of the three proposed federal options and the participants were directed to INAC's material for information concerning these options.

Combined, these documents provided the background information and proposed options for consideration within each region. Each session was organized over two days and proceeded in the same way: once called to order, a morning plenary provided an overview of the issue of matrimonial real property on reserve. This overview was then followed by breakout sessions that were facilitated and designed to consider guiding principles and existing remedies. The afternoon breakout session was dedicated to considering the AFN's proposed legislative and non-legislative options. At the request of the participants, the session organized to consider the AFN's legislative solutions was held in camera. At the conclusion of these breakout sessions, the day was adjourned and further discussion deferred to the second day. The second day began with an opening plenary where a summary of the previous day's discussion would be given by the facilitators and/or note takers. Following this summary, the participants once again resumed discussion in facilitated breakout sessions to consider the federal legislative options. At the conclusion of these breakouts, the participants gathered for a final plenary and concluding remarks.

At the conclusion of each regional dialogue session a without prejudice and confidential written summary was prepared and provided to each region for distribution to its membership. Each region was asked to review the summary and advise if any corrections were required.

1.3 SUMMARY OVERVIEW OF DIRECTION PROVIDED AT REGIONAL DIALOGUE SESSIONS

This report sets out our summary of the direction provided by the participants during the regional dialogue sessions. Generally, a consensus emerged in two areas: the first regards process and the second is the direction provided as regards the proposed options of both the AFN and INAC.

A. Process Direction

Without exception, all participants viewed these sessions as structured for information purposes only and not as consultation forums with the Government of Canada or Department of Indian Affairs.

The participants were clear to express their hesitation and concern with the government's practice of construing any dialogue with First Nations' people as "consultation" for the purposes of moving forward with its stated legislative agenda. In addition, for the First Nation leadership in attendance, they took the position that any decision regarding legislative or non-legislative options would require the input of their communities and they could not bind their communities without further discussion with them.

Consequently, during the course of each session, the AFN spent considerable time providing the necessary information regarding the issue of MRP to ensure a fulsome discussion within each region; information that perhaps the government of Canada assumed was generally known. For example, considerable time was spent explaining the current provincial and territorial remedies available to married couples off reserve such as orders for partition and sale. Ensuring these remedies were properly understood was critical to explaining the "legislative gap" and the need to develop workable solutions.

The public education function of the regional dialogues may not have been fully predicted at the outset but from the very first session in Saskatchewan served to highlight the second fundamental concern of the participants: the lack of a reasonable timeframe.

During each session, the participants were confronted with coming to grips with the complex social, economic, legal and constitutional issues that directly impact the families and children of their communities when families breakdown. Against this backdrop they were presented with the question of how to begin to solve the myriad of issues that arise when a marriage breaks down and the pressure of this task was compounded by a timetable that would likely see the Minister of Indian Affairs introduce a legislative solution as early as April 2007. Needless to say, all participants clearly demanded that more time be provided to permit them the opportunity to share the information they were provided with during these sessions with their community members and to seek the informed input of their membership.

The need to dialogue directly with community members was the final subject of concern expressed by the participants. Participants were clear to express their disagreement with the Minister's process for his failure to dialogue with the communities directly. In the event that the Minister of Indian Affairs does proceed with a legislative solution, the participants were unequivocal in their

assertion that any and all consultation as regards this legislation must take place with the communities directly on the basis that the First Nation communities are the rights holders; it is their collective rights to land that will be impacted by any proposed legislative regime. While the AFN has an important facilitative and coordinating role, participants clearly stated that long term solutions must be developed by and for their respective communities.

B. Direction on Options

Given the seriousness of the issue and the potential impacts to First Nation land rights, the six month, three-phased timeframe established by the Honourable Minister of Indian Affairs was viewed as lacking in fairness and foreclosed the selection of any one legislative or non-legislative option proposed by the AFN for consideration. Thus, while the experience of some First Nations in addressing MRP was shared during each regional session and comments given on each proposed AFN option, no overall consensus emerged on any one option.

Generally, these sessions were viewed as information sessions only and participants expressed the need for further consideration within their communities.

There was however, shared agreement on the principles that should both guide the search for solutions and operate as the basis upon which any solution should be evaluated. These principles are:

- Respect for traditional values;
- Protection of Aboriginal and Treaty rights;
- No Abrogation or Derogation of First Nation Collective Rights;
- Protection and Preservation of First Nations Lands for Future Generations;
- Strengthening First Nation Families and Communities;
- Recognition and Implementation of First Nations Jurisdiction;
- Community Based Solutions; and
- Fairness

In addition, participants shared agreement on certain conceptual approaches regarding solutions but these too require further community discussion and input.

Without exception however, every regional dialogue session flatly rejected the federal option of applying provincial or territorial law as a solution.

Chapter Two: Summary of Assembly of First Nations' Regional Dialogue Sessions

2.0 INTRODUCTION

When a married couple, with at least one First Nation band member, living on or off reserve, decide to separate there are many issues that arise. Often these issues involve the children and/or who should leave the family home? Who should take custody of the children and how should property be divided?

If this family is living off reserve, the laws of the province or territory will apply to resolve how assets, which include personal property (for example furniture, vehicles, cash) and real property (land and objects attached to the land like the family home or business) will be divided.[1] If however, this family is living on a reserve, provincial or territorial laws do not apply to resolve disputes involving land or the family home. So what laws are available to help these families living on reserve determine how these assets of the marriage will be divided?

The answer is different for each First Nation. For some, the First Nation may have traditional laws which help couples determine how to divide the family home and land when separation or divorce occurs. Regrettably, for these First Nations, the federal government does not currently recognize these laws.

Other First Nations may have decided to manage their lands under the First Nations Land Management Act (FNLMA) and have developed (or are in the process of developing) a matrimonial real property code as required by the Act. Other First Nations may have successfully negotiated a self-government agreement and address the division of matrimonial real property as part of this agreement.

For the majority of First Nations managing their lands under the Indian Act, there are no provisions to govern the division of real property on reserve. So, the situation arises that provincial laws do not apply to resolve disputes involving the land or the family home and the Indian Act is silent on the issue (for example, a provincial court cannot make a temporary order of possession to one spouse over the other). For this reason a legislative gap exists for families living on reserve that must be addressed?

2.1 MINISTER'S NATION-WIDE PROCESS

• *The Minister of Indian Affairs' Nation Wide Process on Matrimonial Real Property*

On June 21, 2006, the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians announced the federal government's nation-wide consultation process on matrimonial real property ("MRP") and appointed Wendy-Grant John as his Ministerial Representative. The Minister's process consists of three phases, namely, a planning and preparation phase, a consultation phase and a consensus building phase. These three phases are planned for completion by March 2007.

Minister Prentice invited the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) to identify options to address matrimonial real property issues on reserves. During the consensus building phase, the Ministerial Representative will work with the AFN, NWAC and Indian and Northern Affairs Canada (INAC) to strive to build consensus among the parties on options identified through the nation-wide process.

Where the parties are unable to reach consensus, the Minister has asked Ms. Grant-John to recommend options, including possible legislative solutions. The Minister intends to table legislation on matrimonial real property in the spring of 2007.

• *The Assembly of First Nations' Role in the Nation Wide Process:*

The AFN participated in the Minister's process in accordance with the direction mandated by Resolution Nos. 32/2006 and 72/2006. Resolution No. 32/2006 arose out of the AFN Annual General Assembly in July 2006 and was approved by the AFN Executive.[2] This resolution called for the development of "legislative and non-legislative options to achieve a reconciliation of First Nations and federal and provincial Crown jurisdiction."

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[1] For a description of common features of provincial and territorial matrimonial property laws please see *Indian and Northern Affairs Canada: Matrimonial Real Property Fact Sheet.*

[2] See Appendix A for a complete copy of Resolution No. 32/2006.

To facilitate discussion and the development of options, the AFN coordinated and co-hosted nation-wide Regional Dialogue Sessions. These sessions, held from November 2006 through January 2007 in concert with the participating Provincial and Territorial Organizations, are summarized in this final report and form the basis of the options and recommendations to the Chiefs-in-Assembly regarding next steps.[3]

Due to significant concerns with the Minister's nation-wide process, the Chiefs-in-Assembly tabled a resolution at the December 2006 Special Chief's Assembly. Resolution 72/2006 was discussed at great length at the December Assembly, and based on these discussions, the Executive passed Resolution 72/2006 on February 5, 2006.[4] The resolution calls for the Minister's nation-wide process to be stopped, for the AFN to advocate for reorientation of the process to provide for direct consultations between the Crown and First Nations, facilitation of the development of a general federal consultation policy, and fulfillment of the intentions and approaches in the Political Accord that was signed with the federal government in May 2005.

In a letter dated February 9, 2007, the National Chief provided a copy of Resolution 72/2006 to the Minister, set out First Nations process concerns, and asked for a meeting with the Minister to address First Nations process concerns.[5] In the letter, the National Chief also advised the Minister that until First Nations process concerns are addressed to "our mutual satisfaction, the mandate of AFN officials is limited to advancing the recognition and implementation of First Nations governments and to advance certain non-legislative options."

2.2 WHAT IS MATRIMONIAL REAL PROPERTY?

Matrimonial Real Property is a Canadian legal term used to describe the family home and the land on which it sits.[6] Unlike land ownership off reserve, under the Indian Act, there is no fee simple ownership of reserve land by a Band or band member; legal title to reserve land is held by the federal government and at best an individual band member may have an exclusive right of possession to reserve land.

There are two principal types of possession in reserve land that married couples can acquire. Sometimes the land that a couple occupies on reserve is held by Certificate of Possession but most often it has been assigned by the governing Band Council by Custom Allotment.

A Certificate of Possession is a right of lawful possession of reserve land that is recognized under section 20(2) of the Indian Act. A band member however, can only acquire a certificate of possession with the consent and authorization of both the band council and the Minister of Indian Affairs.

A Custom Allotment is another right of possession to reserve land that a band member may acquire. Many bands do not issue certificates of possession for reserve lands, and rely on allocations by Chief and Council in accordance with the band's customs and traditions.

In addition, regardless of which reserve community the married couple resides, reserve lands are collectively held by all band members and can only be leased or sold with the consent of the entire band. This collective interest in land is a fundamental underpinning of the land rights of the First Nation. Given the collective nature of reserve lands, it is difficult to finance the construction of a family home for example, because section 89(1) of the Indian Act expressly prohibits "the real and personal property of an Indian or a band situated on a reserve" from being mortgaged. This measure is designed to protect the collective interest of band members in their reserve lands.

Consequently, most couples that want to build or purchase a family home on reserve cannot simply go to a bank to obtain a mortgage to build or purchase a home. Nor are there many couples that can build or purchase a family home without some form of financial assistance. This is particularly true for couples on reserve, where the average income in 2006 was $15,667.

Depending upon whether a married couple or the band is building the family home, the type of housing will influence the division of property upon separation or divorce.

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[3] AFN's internal process for addressing this issue required that the regional dialogue process culminate with a meeting of the Chiefs-in-Assembly to review and consider options and recommendations. However, the Minister was unwilling to extend his timeframe for tabling legislation in the spring of 2007. Therefore, the AFN has been unable to complete its internal process.

[4] See Appendix B for a copy of Resolution No. 76/2006.

[5] See Appendix C for a copy of the February 9, 2007, letter from the National Chief to the Minister. As at the date of this report, there has been no response to this letter from the Minister. Thus, the mandate of AFN officials during the phase 3 of the Minister's nation-wide process was limited to advancing the recognition and implementation of First Nations governments and to advance certain non-legislative options.

[6] In Quebec, the term used is an "immovable". For more specific details concerning the law in Quebec upon marriage breakdown please see Appendix J.

• Types of Matrimonial Real Property on Reserves

Matrimonial real property on reserves includes the family home and may include land held by a Certificate of Possession or Custom Allotment.

A. Family Home

Most couples that want to build or purchase a family home on reserve must obtain a loan or subsidy from their band or the federal government. Generally, there are three categories of housing on reserve:

- **Capital housing:** Housing paid for by the band member(s) occupying it and for which bank loan may have been obtained or a subsidy from the band. While the band members may own the house, they may be occupying the land under a tenancy agreement with the band to occupy general band land.

- **Social housing:** Housing owned by the band for which members repay the band and when the house is fully paid off, the band transfers possession of the home to the band member(s).

- **Band-owned rental:** Housing rented from the band. Some bands use tenancy agreements or adopt housing policies to address what happens when the tenants separate.

B. Certificates of Possession

A Certificate of Possession is an interest in land on a reserve, which was created by the federal government under the Indian Act and entitles the band member named in the certificate to lawful possession of the specific parcel of land described in the certificate. This interest can be transferred to another band member only.

Although any member of a band can apply for a Certificate of Possession, a certificate is issued at the discretion of a band council and must be approved by the Minister of Indian Affairs. In other words, there is no automatic entitlement for a band member to receive a Certificates of Possession. Furthermore, a Certificate of Possession, unlike a fee simple interest in land, entitles the holder to only a beneficial interest in the land and not ownership. Instead, according to the Indian Act, the federal crown is the legal owner of all reserve lands.

There are two important considerations when discussing matrimonial property in the form of a certificate of possession. The first is that a certificate of possession may or may not be registered with the Department of Indian Affairs and most band councils do not manage their own registry system. Second, there is no current legislative requirement for certificates of possession to be held jointly upon marriage. This often results in only one spouse being named in the certificate. Upon separation and divorce, the spouse not named in the certificate of possession is often forced to leave the family home. In this instance, where the male is named in the certificate of possession, the woman has no current remedy available to her under the Indian Act.

C. Custom Allotments

A custom allotment is another right of possession to reserve lands that band members can acquire. Custom allotments are allotments of land made by bands or band governments to their members in accordance with their own customs and traditions. The allotment may or may not give a joint interest to the husband and wife.

There is no formal registration of custom allotments by a band. As with certificates of possession, there is no current remedy available to the spouse who has not been allotted an interest in land should the marriage break down.

2.3 THE NEED TO FIND REMEDIES NOT AVAILABLE UNDER THE INDIAN ACT

The legal reality is that provincial and territorial laws governing the division of real property do not apply on reserve. Provincial courts do not have the authority for example, to grant a mother and her children exclusive possession of the family home or exclusive possession of the land where the home is located should they be the ones forced to leave when confronted with a marital break down.

There is good reason why provincial laws do not apply. The federal Crown has exclusive jurisdiction over "Indians and lands reserved for the Indians" pursuant to s. 91(24) of the Constitution Act 1867.

As a result of this federal authority and revisions to the membership provisions of the Indian Act, a woman no longer has to become a member of her husband's band upon marriage. Similarly, a non-First Nation spouse does not acquire the "status" of Indian upon marriage. The membership status and residency of a spouse is a significant factor in the search for solutions.

While the federal Crown has exclusive jurisdiction over Indians and their lands, on reserve spouses and their children are nonetheless entitled to equitable remedies upon the breakdown

of marriage; remedies that are currently unavailable for the majority of First Nations. The search for remedies however, cannot be limited to simply amending the Indian Act to either allow for the application of provincial regimes or impose a new one upon First Nations.

For First Nations, the key to any long standing solution rests is the inherent right to govern their traditional territories, including reserve lands; this inherent right is not contingent upon nor delegated from the Crown. Thus, a long term solution must recognize the authority of First Nations to design, implement and enforce their own solution; solutions that are culturally appropriate and respect their diversity.

2.4 PROCESS CONCERNS

Without exception, the participants at each of the regional dialogue sessions expressed concern around a two core issues of process. These issues have been set out below as they serve to highlight the nature of the concerns when dealing with matrimonial real property across the country and may form the basis upon which a process that guides the search for long term solutions should begin.

The Duty to Consult and Accommodate

There is a great concern that the regional dialogue sessions organized by the AFN will be construed as consultations by the Minister of Indian Affairs. While AFN representatives at each session were clear to explain that the sessions result from the AFN Resolution No. 32/2006 as "a means of developing options for addressing MRP in accord with the principles set out in the Recognition and Implementation of First Nation Governments", all participants expressed their skepticism of the government's intention and cautioned the AFN to prepare for such an interpretation by the Minister.

If the Minister is determined to proceed with new legislation, then the First Nations expect the federal government to consult on a community-by-community basis.

Timetable

All participants expressed frustration and concern with the Minister of Indian Affairs' planned timetable for proceeding with this initiative. All regions expressed the view that it is unrealistic and unfair to expect that this issue can be solved in six months time. Rather than proceed along the Minister's schedule, First Nations would like more time to educate themselves and their community members about the issue and only then develop informed options. This is the preferred method for proceeding and will ensure that by providing meaningful input, they might avoid a "top-down" solution.

2.5 GUIDING PRINCIPLES IN OUR SEARCH FOR SOLUTIONS

AFN Resolution No. 32/2006, directed that "the development of options be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments", which have already been adopted by First Nations and are among the core principles that will guide the search for solutions.

Other complimentary principles may also guide the search for solutions to matrimonial real property issues on reserves. These principles include:

- **Traditional Values**

Respect for traditional values is an essential consideration in the search for solutions to the legislative gap. We need to apply First Nations solutions that are based on our traditions and reaffirm the strong role of First Nations women in our communities.

- **Protection of Aboriginal and Treaty Rights**

First Nations have constitutionally protected s. 35 Aboriginal and Treaty rights to our reserve lands and traditional territories. Solutions to the legislative gap should not infringe upon the constitutionally protected Aboriginal Title and Treaty rights of First Nations to our lands.

- **No Abrogation or Derogation of our Collective Rights**

Section 35 of the Constitution Act, 1982 protects the collective Aboriginal and Treaty rights of First Nations. While section 15 of the Charter of Rights protects individual rights, section 25 of the Constitution Act, 1982 provides that the individual rights guaranteed in the Charter "shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…" Solutions to matrimonial property issues on reserves must not abrogate or derogate from the collective rights of our peoples in our reserve lands and traditional territories.

- **Protection and Preservation of First Nations Lands for Future Generations**

Protection and preservation of reserve lands for future generations is an essential prerequisite in the search for solutions to matrimonial real property issues on reserves.

- **Strengthening First Nations Families and Communities**

To preserve our cultures and strengthen First Nations families, it is essential that solutions enable First Nations children to remain in their communities, live among their extended family, and be taught their language and culture.

- **Recognition and Implementation of First Nations Jurisdiction**

Solutions must provide for the recognition and implementation of First Nations jurisdiction over matrimonial real property on reserve lands.

- **Community-Based Solutions**

The development of solutions must be community-driven and developed by First Nations members. The Aboriginal title and Treaty rights that must be taken into consideration in the search for solutions to matrimonial real property issues on reserves are held collectively by all members of First Nations communities. Thus, all community members must be involved in and participate in the search for solutions.

Without exception, all of the above stated principles were accepted at each of the Regional Dialogue Sessions and an additional principle was identified:

Fairness

In the search for solutions, each instance of martial breakdown must be considered on its own facts and circumstances and result in a fair solution for all family members, most especially the children.

2.6 FEDERAL GOVERNMENT LEGISLATIVE OPTIONS

In its September 2006 document entitled "Consultation Document – Matrimonial Real Property on Reserves" the federal government proposes three legislative options for addressing the legislative gap in respect of matrimonial real property on reserves.

The AFN did not want to misrepresent the content of any of these options, and therefore made available copies of INAC's "Consultation Document – Matrimonial Real Property on Reserves" to participants at AFN Regional Dialogue Sessions.

Any reference to the federal government's options in this report is not intended to be, nor should it be interpreted as AFN or First Nations endorsement of any of the legislative options proposed by the federal government. Rather, in the interest of providing a complete report these options have been set out and the response of First Nations summarized.

The AFN and First Nations reserve the right to identify any specific First Nation's concerns with the federal government's legislative options and to make these known to the federal government.

The three legislative options proposed by the federal government can be summarized as follows:

- **Application of Provincial Laws – Federal Option No. 1**

The first option proposed by the federal government would provide for federal incorporation of provincial and territorial laws on reserves. The application of provincial law was unanimously rejected in AFN Resolution No. 32/2006 as a solution to addressing matrimonial real property issues on reserves.

This option was similarly rejected by First Nations, without exception at each regional session.

• Application of Provincial Law and Delegated Law Making Authority – Federal Option No. 2:

The second legislative option proposed by the federal government would similarly provide for the incorporation of provincial and territorial matrimonial real property laws on reserves. In addition to incorporating provincial and territorial matrimonial real property laws on reserve, under this option the federal government would also put in place "a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property."

Under this option, provincial laws would apply unless and until a First Nation developed its own matrimonial real property laws pursuant to any authority delegated to it by the federal government.

As noted previously, the application of provincial law has been unanimously rejected in AFN Resolution No. 32/2006.

During the Regional Dialogue Sessions, any reference to "delegated authority" was viewed by the participating First Nations as an insult to their inherent and Treaty rights to manage their own lands and therefore, rejected.

• Federal Legislation and Delegated Law Making Authority – Federal Option No. 3

The third option proposed by the federal government would involve the development of "substantive" federal legislation. Like the second option, this option would also put in place "a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property."

Under this option, federal matrimonial laws developed by the federal government would apply unless and until a First Nation developed its own matrimonial real property laws pursuant to any authority delegated to it by the federal government.

The participants at each Regional Dialogue Session were asked to express any concerns with each Federal option and propose any changes that might address their concerns. The first two federal options were flatly rejected for the reasons previously explained. As regards the third option, participating First Nations refused their consent to an option that is more properly the subject of direct consultation with the federal government.

2.7 ASSEMBLY OF FIRST NATIONS' LEGISLATIVE OPTIONS [7]

The AFN's mandate on matrimonial real property issues is set out in AFN Resolution No.32/2006. This resolution calls for the development of options to recognize and implement First Nations jurisdiction over matrimonial real property on reserve lands.

The AFN identified the following options for consideration during the nation-wide regional dialogue sessions. These options are designed to facilitate the recognition and implementation of First Nations jurisdiction over matrimonial real property on reserve lands and related issues.

AFN Option No. 1: Recognition Legislation

Enactment of a recognition bill is a possible option for addressing matrimonial real property issues on reserve. The recognition bill would provide for recognition of First Nations jurisdiction in regard to matrimonial real property issues on reserves and would pave the way for the development, implementation and enforcement of First Nations matrimonial real property laws.

AFN Option No. 2: Government-to-Government Agreement and Implementation Legislation

Under this option, recognition and implementation of First Nations jurisdiction over matrimonial real property on reserves would be achieved through three instruments.

The first instrument would be a government-to-government agreement between the federal government and participating First Nations and would set out the roles and responsibilities of the parties in regard to matrimonial real property issues on reserves. This agreement would effectively provide for de facto recognition of First Nations jurisdiction over matrimonial real property matters on reserve lands.

[7] AFN, Regional Dialogue Sessions Resource Handbook "Matrimonial Real Property on Reserves: Our Lands, Our Families, Our Solutions (Ottawa: AFN, 2006) at p.16.

The second instrument would be federal legislation to ratify and implement the government to-government agreement.

The third class or category of instrument would be legislation enacted by each participating First Nation to ratify and implement the government-to-government agreement. Legislation enacted by participating First Nations would also set out detailed provisions to assist couples on reserve, upon marital breakdown, in dividing the family home and any other matrimonial real property acquired by the couple during their marriage.

AFN Option No. 3: Enforcement Options[8]

There is a number of possible enforcement options that First Nations may wish to consider and adopt as part of their regimes for regulating the disposition of matrimonial real property on reserve lands. One option for consideration is:

First Nations Courts and Traditional Dispute Resolution Mechanisms: Under this option, traditional dispute resolution mechanisms would be relied on or First Nations courts would be established to enforce First Nations matrimonial real property laws and mediate dispute among First Nations couples.

Regional Housing Authority: Under this option, an arm's length housing authority would be established with the capacity and resources to support a number of First Nations within its regional jurisdiction to administer and enforce a mutually agreed upon housing policy and regime.

2.8 ASSEMBLY OF FIRST NATIONS' NON-LEGISLATIVE OPTIONS

The AFN developed a number of non-legislation options for consideration and discussion during the regional dialogue sessions. These options are:

• Prenuptial and Separation Agreements

In most jurisdictions, people can enter into contracts before marriage takes place, which will govern the division of property if the marriage breaks down. These are called prenuptial agreements. They can also enter into agreements after separation. These are called separation agreements.

It is only in circumstances where there is no agreement between spouses that reliance on matrimonial real property law is required to assist couples in finding a fair division of matrimonial property. In other words, the existence of a legislative gap is a much greater concern where couples have not entered into prenuptial agreements that set out how they will divide any property that they may own upon marital breakdown and are unable to reach an agreement on the division of property after the marital breakdown.

Therefore, a large part of the solution may lie in informing First Nations couples about their rights upon entering into marriage or other relationships and upon marital breakdown, including the option of entering into prenuptial agreements.

However, in order to succeed, such a public education campaign would have to be carried on over several years and would only assist First Nations citizens who have not yet entered into any form of marital relationship. Thus, successful implementation of this option would require adequate funding to launch and carry out a sustained public education campaign over a number of years.

Some First Nations citizens may also have cultural biases against the use of agreements to address property rights before or after marriage. Any cultural biases against the use of agreements to address property rights may also have to be addressed as part of any public education campaign.

• Spousal Compensation Loan Fund

While couples on reserve can presently seek and obtain compensation orders in respect of matrimonial real property on reserves, prohibitions against mortgaging reserve lands and lack of access to capital often makes it difficult for spouses to comply with such orders. Thus access to this remedy has not resulted in any increased protection for First Nations couples.

Due to chronic housing shortages on reserves, it is vital that a solution be found to the challenges experienced by First Nations couples in complying with compensation orders. Otherwise, the flow of First Nations citizens from our communities in search of housing will continue unabated.

The solution lies in securing access to capital for couples on reserve, which can be achieved by the establishment of a Spousal Compensation Loan Fund by the federal government. Loans could be granted to band members on reserve who are in the process of divorcing their spouses. This would provide band members with the ability to compensate their spouses for their fair share of the family home and any Certificates of Possession or custom allotments acquired by the couple during their marriage.

[8] Supra, pp. 18-22

• On-Reserve Housing Loan Fund

At current rates of funding it could take anywhere between 15 to 60 years to reduce the current backlog of housing shortages on reserves. As reserve lands are not mortgageable, the failure of the federal government to make sufficient resources available to resolve housing shortages on reserves is tantamount to enforced assimilation, as First Nations citizens are forced away from their communities to find housing or escape overcrowding in First Nations communities.

It is not acceptable that First Nations should have to wait 15 to 60 years for existing housing shortages to be addressed. The federal government is arguably under a fiduciary duty to address chronic housing shortages in First Nations communities within a reasonable period of time.

Women's Shelters

INAC's Family Prevention Program has an annual budget of about $18.5 million. This includes funding for a network of 35 shelters across Canada of approximately $11.5 million per year and about $7 million per year for community-driven family violence prevention projects in First Nations communities.

Minister Prentice recently announced a one-time investment of $6 million for 2006-07 to address the immediate needs of existing shelters and help First Nations communities improve family violence prevention programs and services.

While the annual budget for INAC's Family Prevention Program and the recent one-time investment of $6 million to address the needs of the existing 35 shelters across Canada is much needed and greatly appreciated by First Nations communities, the reality is more shelters are needed. With only 35 shelters to service 633 First Nations across Canada, there are many First Nations families who are unable to seek the supports offered by the existing 35 shelters.

• Dispute Resolution

Dispute resolution outside of court is increasingly being relied on to resolve family law disputes. Some First Nations have been very creative in their use of dispute resolution processed to address family law matters in their communities. For example, the Siksika First Nation has entered into an arrangement with the provincial courts in Alberta, which allows provincial court judges, with the consent of the parties, to refer family law matters (custody, access, maintenance) to the Siksika First Nation's traditional mediation system for resolution. Where the parties reach consensus, this consensus can be captured in a consent order and filed with the court. Dispute resolution processes can similarly be relied on to resolve disputes among couples on reserves over the division of matrimonial property.

• Video Court for Remote Communities

To improve access to justice for First Nations couples in remote communities, the federal government may wish to make funds available for the establishment of video courts to enforce matrimonial real property laws on reserves. Provincial court judges could be appointed to hear family law matters that don't involve any disputes over matrimonial real property on reserves. Federal court judges could be appointed to the video court to hear disputes involving the division of matrimonial real property on reserves. If video courts are established, couples on reserves would thus not have to leave their communities in order to seek relief from the courts in regard to family law matters. This would greatly improve access to justice for remote communities.

• Family Law Legal Aid Fund

To further improve access to justice for couples on reserves, the federal government may wish to establish a Family Law Legal Aid Fund that couples in financial need can draw on when seeking orders in respect of matrimonial real property interests on reserves upon separation or divorce.

• Treatment Facilities

First Nations are interested in strengthening First Nations families and communities. Therefore, First Nations have a strong interest in public education to prevent the incidence of substance abuse and domestic violence in First Nations communities, which in turn may reduce rates of marital breakdown among First Nations families.

Where domestic violence occurs, First Nations are interested in making treatment available for those couples that want to preserve their relationship and provide a stable and nurturing environment for their children.

• Self-Government Agreement

Some First Nations have concluded self-government agreements with the federal government that provide for the recognition of First Nations jurisdiction in regard to family law matters, including the division of matrimonial real property upon marital breakdown.

Although it is not clear whether the federal government will enter into any new negotiations with First Nations to conclude self-government agreements, a First Nation could initiate talks with the federal government to conclude a self-government agreement to address matrimonial real property issues on reserves.

• First Nation Land Management Act

The First Nations Land Management Act (FNLMA) is a federal law enacted in 1999 that ratifies a 1996 Framework Agreement on First Nations Land Management between the federal government and 14 First Nations. Signing the Framework Agreement is the first step to having the First Nations Land Management Act apply to a First Nation.

Once the FNLMA applies to a First Nation, Indian Act provisions relating to land management no longer apply to that First Nation's reserve lands. The FNLMA also recognizes the authority of First Nations to enact rules and procedures "in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land".

First Nations that are interested in assuming control of their reserve lands and matrimonial real property issues on reserves may wish to consider signing on to the Framework Agreement.

• First Nations Housing Policies

Some First Nations have undertaken their own initiatives to address matrimonial property issues. For example, the Mistawasis and Squamish First Nations have adopted housing policies that specifically contain provisions relating to the disposition of matrimonial real property upon marital breakdown.

The Mistawasis First Nation Housing Policy says that in cases of conflict or separation of a common-law union or marriage, "the title of ownership of a Band and/or CMHC [Canada Mortgage and Housing Corporation] unit shall be made to that spouse who shall have the greatest need for the said unit in the opinion of the Housing Authority."

The Squamish Nation Housing Policy addresses the interests of non-member spouses. While persons who are not members of the Squamish Nation generally have no legal interests or rights in any residence or lot, there are special rules for non-member former spouses who are primary caregivers of minor children or dependent adults. In such cases, the non-member former spouse is entitled to remain in the on-reserve residence until the minor children or dependent adults are able to care for themselves or no longer reside with the non-member former spouse. Apart from these situations, a non-member former spouse must vacate the residence within three months of the dissolution of the marriage or relationship.

First Nations who wish to address matrimonial real property issues on reserves can also do so through the adoption of housing and other policies that contain provisions relating to the division of matrimonial real property on marital breakdown.

2.9 COMMON ISSUES ARISING DURING REGIONAL DIALOGUE SESSIONS

During the course of the nation-wide AFN regional dialogue sessions, certain other issues were identified in common. What follows is a summary of the issues and themes that emerged from the regions as a whole.

Balancing Collective and Individual Rights

The need for any solution to reconcile the collective community interest to reserve and traditional territory with the rights of individual people who live on reserve is paramount and must involve the community members directly.

Community Based Solutions

In addition to concerns regarding the consultation process and procedures, First Nations stressed the fundamental principle that a genuine solution will only be found if it comes from the community and is supported by the community. As a corollary to this principle, any imposed solution will be met with resistance; not because First Nations are not prepared to address the issue but because imposed solutions often lack input from First Nations and more importantly, undermine their efforts to be respected as autonomous governments with inherent rights and responsibilities. Similarly, an imposed solution risks impairing the First Nation – government relationship; such an approach would be viewed as disrespectful of leadership and likely suffer for a failure to respond to community circumstances and traditional values and customary laws.

Training and Capacity

Almost without exception, every First Nation is operating in an under-resourced capacity and many expressed concern with a federal government approach that has the potential to introduce sweeping change without the commensurate human and financial supports needed to ensure that was is expected can be carried out. Without these resources, many fear inheriting the high costs of administering an imposed solution similar to the experiences as a result of the 1985 changes to the Indian Act regarding citizenship and membership and are hesitant to embrace any imposed federal solution that fails to recognize and address the lack of resources.

2.10 REGIONAL DIALOGUE SESSIONS

In addition to the shared concerns regarding the process and the issues held in common across all regions, what follows is a summary of the unique but complimentary contribution made at each session.

A. First Nations in Saskatchewan: November 16-17, 2006

The AFN and Federation of Saskatchewan Indian Nations (FSIN) coordinated the first regional dialogue session in Saskatoon, Saskatchewan. Over two days did representatives of the AFN meet with participants invited by the FSIN and Saskatchewan First Nations' Women's Commission. While participants expressed their concern with inadequate notice and little preparation time, those who did attend began the work of identifying the concerns, opportunities and challenges in finding solutions to the issue of MRP on reserve.

A summary of the fundamental issues discussed during the November 16-17, 2006 dialogue session appears below.

The Treaty Perspective

Saskatchewan First Nations are the signatories to Treaty 4 (1874), Treaty 5 (1875), Treaty 6 (1876) and Treaty 10 (1906) and represent approximately 117,000 status Indians.

The Treaties form the fundamental starting point for any discussion of options concerning MRP and must be taken into consideration in the search for solutions.

Given the complexity of the issue and the need for more time to be dedicated to educating and sharing information with the First Nation community members in Saskatchewan, the leadership expressed their desire to continue their dialogue amongst themselves and to that end planned on assembling additional sessions in late November.

Collective Rights to Land

When searching for solutions to matrimonial real property, the collective right to reserve lands held by band members is paramount. This collective right and the relationship First Nations members hold with their traditional territories is most important. For this reason, control of the land must remain with the Nation. For many First Nations, an appropriate balance must be struck between the rights individual band members to the matrimonial home and the collective rights of all band members to the Band's land.

Comprehensive Approach

In addition to the legal complexities that are inherent to the issue of MRP on reserve, long term solutions must be approached from the recognition that multiple socio-economic factors will inform the result. Domestic violence, housing shortages, child custody, access to justice and enforcement capacity are some of the factors that must also inform our thinking around solutions.

Domestic violence not only contributes to marital breakdown but means that we must develop solutions that ensure the safety of women and children.

Chronic housing shortages on reserves mean people lack alternative and affordable housing. These conditions may be a contributing factor leading to family breakdown and may result in one spouse and some or all of the children leaving their community; usually the women and children.

Child custody is often a factor that provincial courts consider when making decisions about who should get temporary or permanent possession of the family home when a couple first separates. While there may be general acceptance that it is unfair for the women and children to be forced to leave the family home upon marital breakdown, this is the reality. Solutions must therefore be developed that ensure First Nations children have an opportunity to live in their communities, learn their language and their culture.

It is costly for couples going through a separation or divorce to seek remedies in the courts. Not only is it costly, many reserves and First Nations communities are located in rural and remote areas further limiting access to the court system. First Nations are interested in meaningful and enforceable solutions and ensuring access to justice is essential to any solution's success.

As with access to justice, once decisions are made about the division of real property assets, these decisions must be enforced and the mechanisms to ensure enforcement are an essential part of any remedy.

B. First Nations in British Columbia: November 20 – 21, 2006

Except for those portions of the province covered by the Douglas Treaties and Treaty 8, there are no historical Treaties between the Government of Canada and the majority of British Columbia First Nations. There are however, modern day Treaties such as the Nisga'a and Sechelt Agreements.

Definition Too Narrow

The terminology "matrimonial real property" and its definition are based upon a language and culture that is traditionally foreign to First Nations. As such, the values and cultural assumptions that might frame not only the problem but its solution are fundamentally different from Western culture and its legal traditions.

The decision to marry for example was traditionally informed by a number of factors that in many marriages in British Columbia was intimately linked to the land and resources. While these cultural underpinnings may be different from place to place they share a commonality of approach – that is - the underlying title to the land rests with the community and not the individual.

"Categories of Exemption"

There are a number of First Nations currently negotiating self government agreements and Treaties. For these First Nations, as well as those communities that have previously chosen to manage their territories pursuant to the First Nations Land Management Act, they would wish that negotiations or current planning not be prejudiced by the government's legislative agenda and for this reason anticipate the need for categories of exemption to be developed.

Protection of the First Nation's Land Base

First Nations in British Columbia have too many recent experiences with Provincial government attempts to encroach upon their jurisdiction to accept any "solution" that openly invites the province to apply its laws on their territories.

As with First Nations elsewhere in the country, preservation and protection of their land base is fundamental to any long term solution. As such, it may be that we need to start from the principle that all non-native people who marry into First Nation communities, must accept that they have no claim to First Nation lands upon marriage breakdown.

Restorative Justice Framework

For many, the issues that arise upon the breakdown of marriage within a community are not viewed as a male/female problem. Rather, the breakdown of marriage involves the entire family. The historical way in which First Nations may have dealt with this issue is not in place in many communities but efforts should be made to seek solutions that bring all the parties with a stake in a particular conflict together to collectively resolve how to deal with the aftermath of the conflict and its implications for the future.

First Nation systems were methodically displaced by the Indian Act and other colonial legislation so it is beyond ironic that today the government wants First Nations to consider a) tinkering to fix this colonial legislative legacy or b) accept their "solution" of more federal legislation.

Fundamental Role of Women

Traditionally, women were the backbone of the family and their role strongly respected. This historical understanding has been adversely affected by the imposition of the Indian Act and residential schools. First Nations must begin to restore their relationships with the women of their communities and reaffirm their paramount role in ensuring the health and strength of our families; their displacement from First Nation communities weakens the collective.

Enforcement

For all First Nations, the success of any solution rests not only on its development but on its implementation and enforcement. The kind of comprehensive approach to solutions being discussed by many First Nations also contemplates the development of community or regional enforcement mechanisms i.e. justice committees or a traveling court. These mechanisms are an equal expression of First Nation jurisdiction and cannot be overlooked.

Areas for Further Research

The question of the magnitude of the MRP problem on reserve was repeatedly asked and it was suggested that further study should be undertaken to help define this. Secondly, consideration should be had to the impacts and cost consequences as a result of an imposed federal approach; this kind of analysis would better inform the dialogue of solutions.

C. First Nations in Manitoba: November 23 – 24, 2006

Manitoba First Nations are the signatories to Treaty 1 and 2 (1871) and Treaty 5 (1875) and today make up 62 First Nation communities.

Definition of the Issue is too Narrow

Many First Nation couples have been married through traditional ceremonies or living common law. When these relationships breakdown, similar issues may arise and for this reason the definition of matrimonial real property should be inclusive of these relationships. When faced with separation and divorce, these couples must grapple with the same issues; solutions must therefore include these partnerships and not be too narrowly defined.

Solutions are constrained by the Federal Process

Again, the Minister's timetable for proceeding within the next six months almost destines the "solution" i.e. there is not enough time for First Nations to develop the kind of long term solutions being contemplated such as restorative justice initiatives and/or comprehensive policy development.

Without Prejudice to First Nation Solutions

Some First Nations have been grappling with this issue through their own means i.e. Custom Councils, Justice Committees, and Elders' Councils. For these First Nations, any legislative solution must not cause prejudice to what is working for them. This is similar to the issue of creating categories of exemptions which may or may not result in a "patchwork" of regimes to deal with this issue across the country.

Capacity and the Role of Provincial Territorial Organizations

Many, if not all First Nations predict that long term solutions if not properly resourced – are doomed to fail. Similarly, it may be impractical for every First Nation to enter into the type of agreement or regime contemplated by the AFN's options. What may be more feasible is a negotiated role for the Provincial/Territorial Organizations to deliver some of the services needed on a regional basis.

Cannot Give What You Do Not Own

Many First Nations do not manage their lands by Certificate of Possession but rather by custom allotments. Similarly, many First Nation members are without sufficient resources to finance the construction of the family home and look to the Band for financial support or alternatively, for rental or social housing. In the latter cases, the homes are financed by the Band through Canadian Mortgages and Housing Corporation ("CMHC"). For the members that reside in these homes, upon separation or divorce, they are not able to partition or sell the home to satisfy a court order; for the simple reason that they cannot give what they do not own. As a consequence, resolving a dispute that involves possession of the matrimonial will directly involve the Band Council and/or housing authority.

CMHC Policies May Create Artificial Barriers to Long-term Solutions

The policies of CMHC (i.e. one loan per member) may create barriers to long term solutions. For example, if a CMHC loan is held in the name of a spouse upon entering marriage and this spouse leaves the home upon separation, s/he is prevented from taking a second loan on another home – even though s/he may no longer reside in the first home.

Domestic Violence Legislation

The Province of Manitoba is one of five provinces and territories in Canada to have its own Domestic Violence Legislation. Enacted in September 1999, "the purpose of domestic violence legislation is to provide victims of domestic violence quick and effective access to the justice system to achieve early intervention. This is typically done through some form of ex parte emergency order that can be made by a justice of the peace, and later confirmed by a court. The orders typically centre on provisions such as granting the victim exclusive occupation of the residence, removal of the respondent from the residence, supervised removal of personal belongings to ensure the victim's safety, and restraints on communication or contact with the victim".[9]

Obviously, any long term solution must consider the impacts of domestic violence legislation on reserve; yet, the Minister's limited time frame may preclude the kind of thoughtful analysis that is necessary in this context.

Provincial Child Protection Laws

The shortness of the timeframe similarly prevents the kind of legal analysis required to ensure that community based solutions are not in conflict but are complementary to provincial child protection laws.

D. First Nations in the Atlantic: November 30 – December 1, 2006

The Mi'kmaq and Maliseet people of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland are represented by the 30 First Nations of this territory.

Bylaw Making Authority

The current bylaw making authority within the Indian Act empowers First Nations to define the terms of residency within their communities. For some First Nations, the exercise of this authority has operated as a limit on the ownership of property within the confines of their reserve boundaries. For example, a non-member spouse may be permitted to reside within the boundary of a First Nation's reserve territory for the duration of the marriage however, upon marital breakdown the non-member spouse must vacate the reserve unless there are minor children involved.

Regrettably, for those First Nations that have attempted to address the issue of matrimonial real property on reserve through the development of a bylaw, the Department of Indian Affairs has refused to approve the bylaw because it exceeds current bylaw making authority.

First Nations have bylaw making power under section 81. (1)(c) of the Indian Act concerning "the observance of law and order" and under ss. 81(1)(i) concerning the "allotment of reserve lands among members of the band". Given this current jurisdiction and authority, many First Nations asked, then why should First Nations not use these combined authorities to create enforceable solutions within their communities using current bylaw making authority?

Family Issue/Best Interest of the Children

Martial breakdown not only affects the husband and wife, but all family members, most especially the children. For this reason, some First Nation communities who manage band owned housing, have adopted the (housing) policy of allocating the matrimonial home to the spouse with custody of the children and consider the "best interest of the children" in applying their policies. This approach may not however, provide a remedy for those couples who have capital housing thereby eliminating any role for the Band in the allocation of property.

[9] *Review of Provincial and Territorial Domestic Violence Legislation and Implementation Strategies*, Department of Justice, (Ottawa: February, 2002).

Valuation of Real Property

Off reserve, the division of real property assets is based upon the fair market value of those assets. On reserve, there is no comparable market place by which to assign or even evaluate the value of a matrimonial home or land. Instead what results is an arbitrary valuation based upon subjective factors; none of which could be substantiated with any reliability to a court of law.

This inability to objectively assess the value of a matrimonial home or land operates as a limit on the remedy of a compensation order.

Information Sharing

Recognizing that there are some First Nations who are addressing the issue of matrimonial real property through the FNLMA regime or by self government agreements, there exist certain templates or precedents of information that might be shared with other First Nations in an attempt to avoid the unnecessary duplication of resources.

Marriage Counseling Before Getting Married

For many First Nations, the discussion of matrimonial real property wrongly places the focus on how to resolve disputes at the end of a marriage. Instead, more attention should be placed on how to prevent marriage breakdown. Efforts that involve non-legislative solutions such as marriage counseling before and during a marriage are just one example.

Non-interference of Band Councils

For those communities whose members are in possession of reserve lands by "certificates of possession", how a couple chooses to resolve a dispute involving their property is for them to decide; the band council government is loathe to interfere. This does not mean however, that the couple would not benefit from an arm's length dispute resolution mechanism that did not involve the courts but did bring certainty and finality to the result in the event of a dispute.

Community Based Solutions and Respect for Band Autonomy

The key to the success of any long term solution rests with community. It is community members that must be involved in the design, implementation and enforcement of any measure if it is to have lasting results. A "top-down" approach, on this or any issue, is unacceptable and likely to fail.

A community based approach is an exercise of First Nation jurisdiction and expression of that Nation's unique culture and custom. No two communities are identical and this uniqueness is what informs workable solutions. For this simple reason, a "one-size-fits-all" approach is unacceptable.

Traditional Dispute Resolution

Ultimately the issue of division of matrimonial real property is one concerning the entity with the power and authority to decide a dispute with certainty. Some First Nations have created community dispute resolution mechanisms that operate at the local level to address the issue. For example, referring a dispute between a husband and wife upon marriage breakdown to an Elders' Council has proven successful. Alternatively, referring a dispute to community justice committee has also proven effective.

E. First Nations in the Yukon: November 24, 2006

There are no reserves in the Yukon Territory subject to the Indian Act. Presently, eleven of the fourteen Yukon First Nations have negotiated self-government agreements. These agreements set aside "settlement land" as "reserves" for the respective First Nations but confirm that the Indian Act does not apply to these lands as reserve lands; in other words, these lands are deemed to be reserves but the Indian Act does not apply to them. The three First Nations without a self-government agreement could either return to the negotiation table, or elect to have reserves created under the Indian Act.

In the Yukon, the Family Property and Support Act determines the division of family assets such as the family home and personal property, the ownership or right to possession of property and the enforcement of a spouse's right to the property. The Yukon law presumes an equal division of family assets upon marriage breakdown regardless of who owns the property unless a spouse can show that an equal division would be unfair in the circumstances.

Since the Family Property and Support Act[10] is a Yukon law of general application, it will continue to apply to Yukon First Nations until such time as a Yukon First Nation makes a law with respect to matrimonial real property pursuant to its self-government agreement.

Self Government Agreements

The Yukon First Nation self-government agreements do not specifically provide for the making of laws in relation to matrimonial real property but do provide for law-making authority in relation to the use and management of their settlement lands.

F. First Nations in Ontario

During their November 15, 2006 Special Assembly, the Chiefs in Ontario passed Resolution No.06/88[11] stating their intention not to participate in the AFN's Regional Dialogue Session and instead develop and communicate their response to Minister Prentice's initiative on MRP directly. This report does not therefore include the position or views of the First Nations in Ontario.

G. First Nations in Quebec: December 13 – 14, 2006

Property and civil rights in the Province of Quebec are governed by the Civil Code of Quebec[12] (hereinafter the "Code"). The Code is a comprehensive written code of rules derived from the civil law of France. It is divided into 10 "books" addressing issues such as the Family, Persons, Property, Successions, etc. At the time of Confederation, each province retained its existing law
which in Quebec was the civil law. The rules enunciated in the Code are the foundation for law or legislation in Quebec.[13]

The Kinds of Property in Quebec

In Québec law, property is either immovable or movable .[14]

For the purposes of matrimonial real property on reserves, a general outline of the property law in Québec is needed to understand the distinctions. Sections of the Code relevant to this topic include the following:

899. Property, whether corporeal or incorporeal, is divided into immovables and movables.

900. Land, and any constructions and works of a permanent nature located thereon and anything forming an integral part thereof, are immovables.

904. Real rights in immovables, as well as actions to assert such rights or to obtain possession of immovables, are immovables.

905. Things which can be moved either by themselves or by an extrinsic force are movables.

907. All other property, if not qualified by law, is movable.

In general, **immovables** are land and include buildings and items permanently attached to the land. Real rights and remedies to assert these rights or obtain possession of immovables are immovables also. The concept of immovable is equivalent to the common law concept of real property.

Movables are things which can be moved or anything not designated in law as an immovable. The concept of movable is equivalent to the common law concept of personal property.

Thus, matrimonial real property would be considered an immovable in Québec law. Any remedies respecting the possession, use or rights to possession, and use of matrimonial real property, would be considered immovables or real property.

10 R.S.Y. 2002, c. 83.

11 See Appendix H for a copy of Chiefs of Ontario Resolution 06/88.

12 C.C.Q., S.Q. 1980, c-39.

13 AFN, Regional Dialogue Sessions Resource Handbook Addendum (Ottawa: AFN, 2006).

14 Book Four "Property" C.C. Q. articles 899 et seq.C.C. Q. articles 152 and 366.

First Nation Communities in Quebec

Certain articles in the Code[15] specifically address First Nations communities:

152. In Cree, Inuit or Naskapi communities, the local registry officer or another public servant appointed under any Act respecting Cree, Inuit and Naskapi native persons may be authorized, to the extent provided by regulation, to perform certain duties of the registrar of civil status.

Within the context of an agreement concluded between the Government and a Mohawk community, the registrar of civil status may agree with the person designated by the community to a special procedure for the transmission of information concerning marriages solemnized in the territory defined in the agreement and for the transmission of declarations of birth, marriage or death concerning members of the community, as well as for entry in the register of the traditional names of the members of the community.

366. […] In the territory defined in a agreement concluded between the Government and a Mohawk community, the persons designated by the Minister of Justice and the community are also competent to solemnize marriages.

These articles do not directly affect spousal rights to matrimonial real property on reserves. They are provided as a precedent by which amendments have been made to the Code for the purpose of respecting traditional practices in First Nations communities in Québec.

The James Bay Northern Quebec Agreement (JBNQA)

In the JBNQA, Canada has the administration, management and control of Category 1A lands. Only Cree members are permitted to reside on these lands. Quebec retains bare ownership of these lands and, subject to other provisions, ownership of mineral and subsurface rights.[16]

The JBNQA is similar to the Indian Act regarding the issue of matrimonial real property: there are no provisions for a matrimonial property regime for spouses living on Category 1A lands.

The Cree Naskapi Act

The Cree Naskapi Act is similar to the JBNQA with respect to Category 1A lands.[17] In addition, this Act provides for a land registry system and a succession regime (i.e. wills and estates) for property. The land registry system is silent on registration of a family residence or any other spousal real rights.[18]

The Cree Naskapi Act, is similar to the JBNQA with respect to Category 1A lands.[19] In addition, this Act provides for a land registry system and a succession regime (i.e. wills and estates) for property. The land registry system is silent on registration of a family residence or any other spousal real rights.[20] In the event of intestacy (i.e. a person dies without leaving a will) the succession regime recognizes the unmarried spouse or consort as a lawful heir (but both spouses must be unmarried). In addition, there is provision for the disposition of traditional property by a family council limited to movable or personal property.[21]

The Cree Naskapi Act provides the unmarried spouse with a right to a share of the estate as a lawful heir. This is the only effect with respect to matrimonial real property on Category 1A lands. Thus, Cree spouses living on these lands will likely encounter the same issues respecting matrimonial real property as other married spouses on reserves in Québec.

Community Information Sharing/Best Practices

There is a general recognition that we may be able to learn from each others' experiences in so far as other First Nations have taken the lead in addressing the issue through policy and/or traditional law making. In either case, we should be compiling precedents or best practices templates for distribution throughout the country.

Restorative Justice

First and foremost, many First Nations want to avoid the situation of implementing a unilaterally developed and imposed federal solution. Second, many First Nations want to approach the matter of resolving MRP from a framework that restores traditional approaches to justice and does not rely upon the provincial court system.

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15 C.C. Q. articles 152 and 366.

16 Supra, p. 3 citing JBNQA, S.C. 1976-77, c. 32, Section 5 Land Regime, s. 5.1.1 Category IA Lands.

17 Supra, p. 4, citing Cree-Naskapi (of Quebec) Act, 1984, s. 2 Definitions.

18 Supra, p. 4, citing ss. 150-153.

19 Cree-Naskapi (of Quebec) Act, 1984, c. 18, s. 2 Definitions

20 Supra, ss. 150-153.

21 Supra, ss. 173 et seq.

Housing Policy

Some First Nations have attempted to address matrimonial real property issues through their on reserve housing policies. These policies give priority of residence and possession in the matrimonial home to the custodial parent; and in some instances, this possession is limited until the child (ren) reaches the age of 18 years.

Custodial Parent

The issue of child custody is a matter of provincial jurisdiction and when examining the issue of marital breakdown is another factor to be considered when contemplating long lasting solutions. For example, provincial laws throughout the country often apply a "best interest of the child" approach to determining custody. Added to this analysis is the stability of remaining in the family home.

For many First Nations, considering the "best interest of the child" is already an unwritten principle when addressing the matrimonial home.

H. First Nations in Alberta: January 17, 2007

Alberta First Nations are the signatories to Treaty 6 (1876), Treaty 7 (1877) and Treaty (1878) and represent over 96,000 status Indians.For these First Nations, the Treaties too form the fundamental starting point for any discussion of solutions regarding the issues of MRP. More specifically, the matter of MRP is but one part of the unfinished treaty business the Alberta First Nations want to address with the Government of Canada. As other First Nation leaders stated, any long term solution must come about only after extensive discussion with their membership.

Recognize Jurisdiction

As Treaty signatories, there is no need for further legislation to define the lawmaking power of the First Nations in Alberta. On the contrary, the jurisdiction of First Nations in Alberta is found within the Treaties; they will be the architects of any solution surrounding the division of property upon the breakdown of marriage.

One Size Does Not Fit All

An imposed legislative solution is a deliberate failure to recognize the diversity of First Nation people in this country and a breach of Canada's Treaty obligations. The First Nations in Alberta question the need for one option to be accepted nationally and instead support the need for any and all options to be designed and implemented from within the community, not outside of it.

Moratorium on Legislative Amendments

Some Alberta First Nations are currently negotiating self-government agreements. Others intend to seek out similar negotiation tables in the near future. With this in mind, these First Nations take the view that no legislative amendments or new legislation should be introduced that will impact these negotiations until all First Nations are given a reasonable amount of time to consider the impacts and/or conclude their negotiations.

I. First Nations in the North West Territories: January 19, 2007

The unique circumstance of First Nations in the NWT means that consideration of the issue of MRP brings forward distinct concerns. At present there is only one reserve in the NWT, being the K'atlodeeche First Nation located in Hay River. The balance of the territory is the subject of various comprehensive land claim and self-government agreements.

The Family Law Act of the Northwest Territories provides for the division of family property upon the breakdown of a marital or common law spousal relationship. The division of family assets, including real property and the family home, is based on value. Under the Act, spouses are presumed to be entitled to an equal share of any increase in the total value of their property during the relationship, irrespective of contribution.

When separating couples cannot agree on the ownership, possession and use of the family home, the Family Law Act provides for various remedies similar to other provinces such as, exclusive possession, partition and sale.

The Supreme Court of the Northwest Territories has followed the Supreme Court of Canada's ruling in Derrickson and refused to apply the territorial Family Law Act to issues involving matrimonial property on the Hay River reserve .[22] Other case law demonstrates that provisions of the Act will apply to the division of matrimonial property on First Nations non-reserve land.[23]

[22] Buggins v. Norn [2004] N.W.T.J. No. 85 (SC) (QL) at paragraph 8.

[23] Black v. Wetade [2006] N.W.T.S.C. 51 (CanLi).

Until the matter is finally settled, it appears that the Supreme Court of the Northwest Territories will apply the Family Law Act to the non-reserve lands of the Gwich'in First Nation, the Sahtu Dene and Métis lands and the Tlicho First Nations lands.

Jurisdiction and First Nation Autonomy

Increasingly, the Supreme Court of the NWT is deciding upon issues that the members of K'atlodeeche First Nation believe more rightfully belong with them; it should be the First Nations rather than territorial courts making decisions about what happens in their communities.

For many members the continued interference from outside governments into their affairs is not welcomed; particularly where this interference impacts upon the welfare and best interests of their children. No one is prepared to accept a solution to this issue that would displace local decision making and the authority of leadership within their community.

J. Forum for First Nations Women Chiefs and Councillors: February 12-14, 2007

On February 12-14, 2007, the Assembly of First Nations hosted a First Nations Women Chiefs Forum at Vancouver, B.C. The theme of this historic three-day forum was "Our Families, Our Lands, Our Future". The purpose of this forum was to discuss the following critical and inter-related issues: poverty; matrimonial real property; the central role of women in sustainable communities; and First Nations jurisdiction.

What follows is a summary of the Chiefs discussion of matrimonial real property during the forum.

Concern with the Minister's Nation Wide Process

The women were unequivocal in their rejection of the federal government's attempts to address matrimonial real property on their behalf; they are skeptical of the government's intention to address this issue in the face of other discriminatory and assimilationist initiatives taken up by government in the past.

The women echoed the call on government by other leaders during the Regional Dialogue Sessions to consult directly with First Nations if it introduces legislation in the spring of 2007.

Consequently, the women flatly rejected any attempt by the federal government to address matrimonial real property and resolved to state this position publicly at the conclusion of the forum.

Jurisdiction and Nation Building

The women were clear to state that the present government's efforts to impose legislation is yet another example of government creating controversy amongst and between the men and of women of First Nation communities. Rather than support this division, the women spoke of the need to work together to find solutions for the men, women and children affected when a marriage breaks down.

Together, communities need to take real action and begin with documenting their own laws and asserting their own jurisdiction. Where Treaties have been signed in this country, the Treaties set out the political relationship of First Nations with Canada; there is no need for additional agreements.

Revitalizing Our Traditions

The women spoke of the need to return to the stories, legends and teachings of their communities for guidance on how best to address the issue of matrimonial real property today. Too often people have forgotten how disputes were resolved in the past and the importance of family in finding lasting, workable solutions. A fundamental component of these original teachings has been to always consider what is in the best interest of the children.

Housing

Sadly, most First Nation communities suffer from chronic housing shortages and the housing that is available is sub-standard. While First Nation government's struggle to provide for their membership, many are accumulating large debts as a result of CMHC and its unfair housing programs; these programs set the communities on a path toward failure.

Consequently, the issue of matrimonial real property can have no lasting solution within communities unless and until the sub-standard, chronic housing issues are also addressed.

Consensus Statement

At the conclusion of the Forum on February 14, 2007, the Women Chiefs developed a Consensus Statement to reflect their unanimous voice on issues affecting their Nations, families and future. See Appendix L for a copy of this statement, which was unanimously adopted by First Nations women Chiefs and Councillors in attendance at the Forum. The motion to adopt the consensus statement was moved by Chief Maureen Chapman of the Skawahlook First Nation and seconded by Chief Lynda Price of the Ulkatcho Indian Band.

2.11 CHALLENGES AND OPPORTUNITIES

This report reflects the unique perspectives offered by each region during the AFN's dialogue sessions. As all parties consider next steps, it may be useful to set out a number of identifiable challenges when going forward and view these as an opportunity to inform what comes next and when.

While the issue of MRP on reserve has been the subject of examination by Canadian governments over past decades, the issue is not equally understood within communities. For this reason, community members, First Nation leadership and the Canadian governments are not at the same level of awareness or education about "legislative gaps" and MRP.

To ensure a more equal understanding which in turn may result in long term solutions, all parties might benefit from more time directed at **public education**.

Similarly, First Nations are not starting from the same place in their readiness or capacity to respond to this issue. **For this reason, potential solutions should neither prejudice nor penalize First Nations** because of capacity as all First Nations will require additional resources (human and financial) to implement long term solutions and ensure their compliance.

Finally, the Minister of Indian Affairs has been transparent and indicated his interest in seeking a legislative solution from the start. First Nations are suspect that this legislation is already in development and will impose a solution on them rather than recognize their authority to design, implement and enforce solutions that are culturally appropriate and respect their diversity. First Nations may wish to consider adopting interim solutions as a means of mitigating an imposed federal government approach. For example, First Nations might consider developing policies to address the issue (i.e. housing and/or residency).

It has become overwhelmingly clear that First Nations are either unable and/or unprepared to meet the Minister's timetable for the most basic of reasons. The time pressure, limited human and financial capacity, the threat of pending legislation as well as the outstanding issue of the federal Crown's consultation and accommodation obligations have all underscored the need for a more fairly designed process that respects the needs and decision making processes of First Nations governments and peoples. First Nations are committed to resolving this issue in a fair, just and effective manner. First Nations are confident and fully prepared to participate in constructive alternative processes and solutions that addresses their concerns outlined in this report to generate lasting change for all impacted by the current situation.

The final chapter will review some of the current practices of First Nations and ideas advanced during the regional dialogue sessions regarding the search for solutions.

Chapter Three: The Search for Solutions

3.0 INTRODUCTION

We know that each province and territory currently has laws that define what matrimonial property is. The provincial and territorial definition of matrimonial real property includes land and the family home. Upon marriage breakdown, when spouses cannot agree between themselves as to how to fairly divide what was once shared property, the provincial and territorial laws may assist the couple and provide the answers. These laws affecting land and the family home however, do not apply on reserve.

While the Indian Act still applies to most First Nations, it is silent when dealing with matrimonial real property issues on reserves.

Some First Nation governments have exercised lawmaking powers over matrimonial property as a result of self-government agreements or under the First Nations Land Management Act. For those First Nations who have sought to exercise lawmaking powers outside of these two regimes, say for example as an exercise of bylaw making authority, the federal government has denied their authority to do so within the Indian Act.

So, the Government of Canada asks the question, "Which government should pass laws to protect the property rights of spouses on reserve?" and "What kinds of legal protections are needed?" [24]

This final chapter will attempt to answer these two fundamental questions.

3.1 THE LAWS OF WHICH GOVERNMENT?

For First Nations the answer to this question is very straightforward: they are the government with the power to pass laws to protect the property rights of spouses within their communities. Furthermore, any external law making power that comes into force without their informed consent will be opposed and viewed as a further erosion of the First Nations-Government relationship. This is the categorical view of those First Nations that assert the inherent right to govern their lands, that are Treaty signatories, have negotiated self-government agreements, are currently in negotiations or intend to undertake such a process.

Contrary to the view that only the federal government is interested in addressing the issue of MRP on reserve, some First Nations have taken the initiative of addressing matrimonial property issues as part of their self-government negotiations or within the First Nation Land Management Act regime. In the case of one Ontario First Nation, they have chosen to address MRP as an exercise of their inherent right to govern and manage their own land base irrespective of any delegated federal authority or negotiated self-government agreement. The exercise of this authority however, prompted the Minister of Indian Affairs to deny the authority of this law as outside of the Indian Act. [25]

Other First Nations have taken the initiative of addressing the issue through residency bylaws, housing policies, restorative justice programs or court annexed mediation. Each of these regimes (i.e., self-government agreements, FNLMA and policy initiatives) can provide useful examples of how to address the issue without simply applying provincial and territorial law. Implicit within each of these initiatives is an emphasis upon the need to protect the use, occupancy and possession of First Nation land.

[24] Matrimonial Real Property, FACT SHEETS, Indian and Northern Affairs Canada, p.2.

[25] Ojibways of Sucker Creek First Nation Matrimonial Real Property Law. This law was accepted by the community through a referendum.

3.2 WHAT KINDS OF LEGAL PROTECTIONS ARE NEEDED?

Self Government Agreements

The matter of MRP may be addressed by First Nations in self-government agreements. For example, the Westbank First Nation has addressed MRP in their agreement as follows:

Treatment of Interests in Westbank Lands on Marriage Breakdown

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(a) Westbank First Nation has jurisdiction in relation to treatment of interests in Westbank Lands on marriage breakdown involving at least one Member and shall enact a law within twelve months of the Effective Date setting out rules and procedures applicable on the breakdown of a marriage to use, occupancy and possession of Westbank Lands and the division of interests in these lands.

(b) For greater certainty, the laws referred to in subsection 108(a) shall notdiscriminate on the basis of sex but may distinguish as between Members andnon-Members for the purpose of determining what type of interest in Westbank Lands may be held by an individual.

(c) Any dispute between Canada and Westbank First Nation in respect of this section shall be subject to arbitration following the rules provided in section 271.

First Nation Land Management Act

Under this Act, First Nations are responsible for enacting rules and procedures "in cases of breakdown of marriage, respecting the use, occupation and
possession of First Nation land and the division of interests in First Nation land."

Of the rules and procedures enacted, certain similarities have emerged. These similarities include:

- Recognizing the right of spouses to create prenuptial agreements that would govern the division of property;
- Compulsory mediation;
- The right to defer the dispute to a court of competent jurisdiction if no resolution has emerged after exhausting compulsory mediation; and
- In cases involving the matrimonial home, the courts shall be guided by the principle that the custodial parent of a child should have exclusive possession of the family residence for a period sufficient to ensure that the child reaches the age of majority and has the opportunity to complete his/her education.

Other First Nation Solutions

Apart from the negotiated processes found within self-government agreements and procedures created with the FNLMA regime, First Nations are attempting to address the issue of MRP by other means. Some of these are set out below and may provide a basis for further discussion. What is key to understanding these initiatives is the deliberate separation of an interest in land from an interest in the family home.

For First Nations, reserve land can never be the alienated away from the Band without the whole Band's free and informed consent. In other words, no entity outside of the band will ever have the authority to order or compel the sale of a parcel of reserve land without the consent of the entire band. It is this collective right to Band land that must be protected and preserved.

Similarly, material things that have been acquired during the marriage or common law relationship also deserve protection such as money in bank accounts, furniture, cars and other personal property items. The family home is a unique item of property: it is attached to the land and upon marital breakdown, if it is not sold, then will be occupied by at least one spouse and/or children. Sometimes separating couples are able to come to a satisfactory arrangement regarding the home and do not need the assistance of the courts, their Band government or other outside entity to resolve the issue of possession. Many people cannot resolve the matter themselves and turn to the courts or some other means.

The initiatives set out below highlight the practices that have developed in some First Nation communities as ways to resolve disputes that involve the matrimonial home.

Dispute Resolution

When a marriage breaks down in First Nation communities, at least one spouse may look to the governing Chief and Council for assistance and/or advice regarding the matrimonial home. In these circumstances any number of possibilities exists. The First Nation may have a defined resolution process within its self-government agreement or land code as required by the FNLMA. Others may have created a dispute resolution process based upon traditional laws that may involve Elders within the

community. In one community in Manitoba for example, a **Committee of Elders** is asked to intervene to assist the couple (and therefore the community) in finding a solution that results in fairness to all sides. In describing this Committee certain pre-requisites were noted, such as:

- The Elders were selected by and from the community as a whole; and
- The Committee offered their advice at arm's length from the Chief and Council [26]

The Committee of Elders considers the circumstances of each family on a case by case basis and to date, with great success.

For those First Nations that have enacted their own rules and procedures under the *First Nation Land Management Act* what is common amongst their approach is to create a community dispute resolution mechanism that must first be exhausted before recourse can be had to a court of competent jurisdiction. For example, one spouse may apply to the Chief and Council for mediation services. Where the mediation is successful, the agreement of the parties is reduced to writing in a separation agreement which may include land. If the couple is unsuccessful in mediation, the Chief and Council will provide a certificate attesting their attempt to resolve the matter through mediation and this certificate is then filed with a court of competent jurisdiction. The law of the First Nation then defines the jurisdiction of the court with regard to its land and the remedies available to it.[27]

Court Annexed Mediation

Similar to the regime set out under the FNLMA, a First Nation may assist a couple by providing mediation services. If the couple is unable to come to a satisfactory resolution using mediation, then recourse may be had to a court of competent jurisdiction. [28]

Alternatively, one might adopt the regime created by the Siksika Nation for example, who has entered into an arrangement with the provincial courts in Alberta, which allows provincial court judges, with the consent of the parties, to refer family law matters (custody, access, maintenance) to the Siksika First Nation's traditional mediation system for resolution. Where the parties reach consensus, this consensus can be captured in a consent order and filed with the court. [29]

Dispute resolution processes might similarly be relied on to resolve disputes among couples on reserves over the division of matrimonial property.

Travelling Mediators and/or Adjudicators

While dispute resolution may be widely viewed as the most viable alternative to an imposed legislative solution, many communities are without the requisite human and financial resources to provide these services to their membership. Further consideration should therefore be had to the creation of a travelling mediation service made up entirely of First Nation people with the necessary experience, knowledge and expertise to assist community members. Consideration might also be had to managing the services of various mediators by region or Treaty territory.

Housing Policies

In developing a housing policy, a First Nation may have considered the effects of marriage breakdown on housing needs. Such a policy will have the most relevance to band owned property where the band or CMHC unit has been made available to the family upon certain conditions.

For example, the Squamish Nation makes available its housing units to four categories of members: single, single parent, married/common law, and pensioner. In the case of non-members, only those non-members who are also primary caregivers of minor children or dependent adults may reside in the family home for a defined period of time.

One potential solution for social housing or band-owned rental housing may be to draft a housing policy based upon the principle that the matrimonial home will remain with the custodial parent based upon the needs of the child (ren) until such time as the child reaches the age of majority OR the needs of child or custody arrangements change. Alternatively, consideration must be had to circumstances when both parents loose custody of the children.

In addition, consideration must be had to recently enacted Domestic Violence Legislation in those provinces and territories that have taken this step. Even in those provinces without this legislation, the safety of the family should also be a consideration when determining policy criteria for resolving possession of the family home.

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26 Manitoba Regional Dialogue Session, November 23, 2006.

27 See for example the Matrimonial Real Property Law of the Chippewas of Georgina Island First Nation.

28 See the Beecher Bay First Nation Matrimonial Real Property Act; the Whitecap Dakota First Nation Matrimonial Real Property Law; the Chippewas of Georgina Island First Nation Matrimonial Real Property Law.

29 Regional Dialogue Sessions, Resource Handbook Assembly of First Nations, 2006, p. 20.

This policy may have little application to capital housing unless the family home has been in whole or in part subsidized by the band, in which case such a housing policy may apply.

Alternatively, the non-member spouse must vacate the on reserve family home within three months of separation unless circumstances warrant an extension in the opinion of the Housing Authority (or Council of Elders or other ADR process).

Bar against Joint Interest in Reserve Lands to anyone other than Band Member

Under sections 20-28 of the *Indian Act*, band members may obtain and exercise possession of reserve lands. Many Band members rely on allocations by Chief and Council to take possession of land and a family home. In most instances, these allocations of land are not registered. Alternatively, a band member may take possession of reserve land by certificate of possession. Again, these certificates may or may not be registered. In either case, it is not a current requirement that an allocation or certificate be held jointly by spouses who are also members of the same band. Creating a mandatory joint interest would prevent one spouse from transferring or selling his/her interest to another band member without the consent of the other spouse. To affect this change would require amendment to the Indian Act.

Conversely, it is implicit within the provisions of the Indian Act regarding possession of reserve land that possession is limited to the Band or its members only. Thus, only band members may be allocated possession or apply for a certificate of possession from the Band. Thus, non-members can never have an interest in reserve land even though they may have a right of joint possession to the family home for the duration of their marriage and/or while also caring out the role of primary caregiver. This limitation on the rights of non-members is necessary and justifiable if First Nations are to give expression to the collective nature of their land rights.

For non-members then, it is only the economic value of their interest in the matrimonial home that must then be compensated should one spouse vacate the family home.

Residency Bylaw

Section 18.1 of the Indian Act provides statutory authority for the residence of Band members and his/her custodial children on a reserve:

> **s. 18.1** A member of a band who resides on the reserve of the band may reside there with his dependent children or children of whom the member has custody.

Generally, residency rights of both band and non-band members may be addressed through by-laws enacted by the Chief and Council pursuant to sub-section 81(p.1) and (p.2) of the Indian Act which read as follows:

> **s.81(1)** The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (p.1) the residence of band members and other persons on the reserve;
>
> (p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band.

Perhaps the clearest limitation on the rights of non-band members is through a residency bylaw. For example, Six Nations of the Grand River have the following residency bylaw in effect:

> Only a registered band member of the _____ First Nation shall be entitled to reside on the _____ First Nation lands. Those in violation of any of the provisions of the By-Law shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days or both. [30]

The effect of this bylaw is to prevent all persons except band members from lawfully taking possession of lands and/or property on reserve. Thus, if a non-band member chooses to reside in a home in contravention of this bylaw, they do so at their own risk.

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[30] This sample reflects the current residency by-law of the Six Nations of the Grand River Territory. In 1996 this by-law was challenged in the Ontario Court (General Division as it then was) as a breach of s. 15 of the Charter or Rights and Freedoms in Six Nations of the Grand River v. Henderson. The court found the by-law contravened s. 15(1) of the Charter but the socio-economic circumstance of the Band and overcrowding on the reserve were sufficient to justify the by-law under section 1 of the Charter.

Enforcement

All policy and bylaw practices explained thus far are enforced by Band government. These are not the remedies that create the greatest challenges regarding enforcement. If the laws of the province or territories are extended to reserve lands, then questions arising regarding enforcement must be addressed. For example the remedy of partition and sale may harshly impact upon the family in ways not intended if the family were living off reserve.

The chronic housing shortage on most reserves creates an environment where the basic housing needs of band members cannot often be met. For courts to be permitted to order partition and sale of the matrimonial home – where little if any alternative housing within the community is be available the family - may be oppressive.

Similarly, the limitations of enforcing compensation orders on reserve create a unique legal environment to which further consideration ought to be had to protect the rights of spouses upon marriage breakdown. Currently, a compensation order as between two band members is enforceable on reserve.

If however, the spouse seeking the compensation order is not an "Indian" within the meaning of the Indian Act, then s/he may be unable to enforce the remedy. There are valid reasons why an Indian within the meaning of the Indian Act is exempt from seizure of property located on reserve under s. 89 of the Act all of which form the fundamental basis of the protection and preservation of reserve lands for future generations.

3.3 CONCLUSION

This section has attempted to highlight the attempts of some First Nations to address the issue of MRP without recourse to simply applying provincial or territorial law within their boundaries.

As has been stated throughout this report, First Nations believe that the long term solutions to this issue must involve their community members directly from inception and must come about as an exercise of their inherent right to govern their lands. It is hoped that the few initiatives cited herein exemplify the kinds of creative problem solving that is possible given the opportunity and necessary capacity to do so.

Appendix A.

Resolution No. 32/2006

ANNUAL GENERAL ASSEMBLY **Resolution no. 32/2006**
July 11, 12, & 13, 2006, Vancouver, BC

SUBJECT:	**MATRIMONIAL REAL PROPERTY**
MOVED BY:	Grand Chief Doug Kelly, Proxy for Shxw'ow'hamel, BC
SECONDED BY:	Dene National Chief NWT, Noeline Villebrun, Proxy for K'atlodeeche (Hay River Dene) FN, NT
DECISION:	On July 13, 2006, the Co-Chair referred draft resolution numbers 1 to 36 to the AFN Executive Committee for their consideration. On July 31, 2006, at a duly convened meeting, the AFN Executive Committee received and affirmed these draft resolutions.

WHEREAS First Nations have the constitutionally protected inherent Aboriginal and Treaty right to regulate all matters relating to the members of their nations, including the division of matrimonial real property on First Nations lands; and

WHEREAS the legislative gap in respect of matrimonial real property laws on First Nations lands represents an intolerable violation of the human rights of First Nations men, women and children, which has resulted in repeated sanctions against the Government of Canada by the United Nations; and

WHEREAS First Nations, through Special Chiefs Assembly March 2005, agreed on the overall vision of recognizing and implementing First Nations Governments and confirmed the appropriate principles and processes to pursue this objective; and

WHEREAS the First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments signed May 31, 2005 establishes an appropriate process for effecting

Certified copy of a resolution adopted on the 31st day of July, 2006 in Winnipeg, MB.

the reconciliation of First Nations and federal Crown jurisdiction over matrimonial real property and joint policy development; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on matrimonial real property; and

WHEREAS the consultation process developed and proposed by the Department of Indian and Northern Affairs (INAC consists of the following phases:

a) Planning and Development – June to August 2006;
b) Consultations – September 2006 to January 2007;
c) Consensus Building – February to April 2007;
d) Tabling of Legislation – April or May 2007. , and

WHEREAS on May 17, 2006 Conservative MP Brian Pallister tabled Bill C-289, which is a private members bill entitled "An Act to amend the Indian Act (matrimonial real property and immovables", which would extend the application of provincial matrimonial property law to reserve lands; and

WHEREAS the federal government intends to table legislation to regulate matrimonial real property rights on reserve lands in April or May, 2007;

THEREFORE BE IT RESOLVED that the Chiefs in Assembly provide a mandate to the National Chief and the Assembly of First Nations to seek a reconciliation of First Nations and Crown jurisdiction over matrimonial real property on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the National Chief and the Assembly of First Nations to secure resources to ensure a First Nation specific process that includes effective and full participation of First Nations in the development of legislative options on matrimonial real property;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that a Matrimonial Real Property Working Group (MRPWG) be established and consist of members from both the AFN Women's Council and the RIFNG Chiefs and Experts Committee*;*

BE IT FURTHER RESOLVED that the Assembly of First Nations/National Chief/MRPWG undertake and oversee the following activities:

a) to develop legislative and non-legislative options to achieve a reconciliation of First Nations and federal and provincial Crown jurisdiction;
b) that any legislative and non-legislative options developed achieve an appropriate and respectful balance between the collective and individual rights of First Nations citizens/peoples;

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c) to seek clarification from the Government of Canada regarding the potential effect, if any of Bill C-289 on the consultation process.
d) to develop and implement a communications strategy to advance the interests of First Nations in regard to matrimonial real property on the domestic and international fronts;
e) to engage in discussions with First Nations and First Nations citizens on legislative options developed to implement First Nations jurisdiction in respect of matrimonial real property interests on First Nations lands, in accordance with the elements of First Nation policy development established by the Assembly of First Nations including, full national dialogue, regional discussions, and First Nations consent.

BE IT FURTHER RESOLVED that the development of options, both legislative and non-legislative, be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments;

BE IT FURTHER RESOLVED that the Chiefs in Assembly unanimously reject the application of provincial matrimonial real property laws on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the Assembly of First Nations/National Chief, as required, to seek additional time to develop legislative options during the Planning Phase of the federal government's proposed consultation process and timeframe;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that any proposed legislation be subject to further consultation and the consent of First Nation Governments prior to application.

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Appendix B.

Resolution No. 72/2006

SPECIAL CHIEFS ASSEMBLY **Resolution no. 72/2006**
December 5, 6 & 7, 2006, Ottawa, ON

SUBJECT:	**MATRIMONIAL REAL PROPERTY – PROCESS CONCERNS**
MOVED BY:	Doug Kelly, Proxy, Kwakwa'Apilt First Nation, BC
SECONDED BY:	Chief Deborah Chief, Brokenhead Ojibway Nation, MB
DECISION:	Passed by AFN Executive on February 5, 2007

WHEREAS the federal government unilaterally developed three legislative options to address matrimonial real property issues on reserves; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on the legislative options for matrimonial real property, notwithstanding that the federal government lacks a specific consultation policy to consult with First Nations on matters affecting our constitutional rights and interests; and

WHEREAS the legislative options proposed by the federal government will adversely impact and infringe the inherent Aboriginal and Treaty rights of First Nations, thereby imposing a legal duty on the Crown to consult with all First Nations whose inherent Aboriginal and Treaty rights may be adversely affected by the federal government's proposed legislative options; and

WHEREAS the federal government has stated its intention to table legislation in 2007 that will regulate matrimonial real property rights on reserve lands; and

WHEREAS First Nations are unanimously concerned that the timeframe proposed by the Minister for consulting with First Nations and for tabling legislation on matrimonial real property issues on reserves is too short and rushed and effectively compromises the ability of First Nations to fulfill our reciprocal duty to engage in the consultation process in an informed manner and does not respect the principle of free, prior and informed consent; and

Certified copy of a resolution adopted on the 7th day of December, 2006 in Ottawa, ON

WHEREAS First Nations Chiefs lack the capacity and resources to prepare for and participate in consultations with their communities , nor are they in a position to evaluate and make informed decisions about legislative options proposed by the federal government; and

WHEREAS the Crown cannot delegate its legal duty to consult with First Nations to any third party and must consult directly with any First Nation whose inherent Aboriginal or Treaty rights may be adversely impacted by any proposed government action.

THEREFORE BE IT RESOLVED that federal legislated options for Matrimonial Real Property are rejected by First Nations; and

FURTHER BE IT RESOLVED that the Chiefs in Assembly assert that Canada must fulfill the intentions and approaches established in the First Nations - Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments (May 2005) including that the parties agreed to promote meaningful processes for reconciliation and implementation of section 35 rights to improve quality of life and to support policy transformation in any areas of common interest; and

FURTHER BE IT RESOLVED that it is the position of the Chiefs in Assembly that the federal government must engage and finance First Nations to develop meaningful, effective and mutually acceptable community-based consultation and accommodation processes and policy as a prior requirement to the development of any federal legislation; and

FURTHER BE IT RESOLVED that the Chiefs in Assembly direct the federal government to recognize and respect existing First Nations laws and traditions as they pertains to consultation and accommodation; and

FURTHER BE IT RESOLVED that the current process as established by the Government of Canada to deal with the issue of Matrimonial Real property, does not meet the consultation framework established by First Nations and confirmed in the First Nations – Federal Crown Political Accord on the Recognition and Implementation and Implementation of First Nations Governments; and

FURTHER BE IT RESOLVED it is the position of the Chiefs in Assembly that the current process, established by the Government of Canada, must be stopped and re-oriented to fully respect and implement the position of First Nations as confirmed in this resolution; and

FURTHER BE IT RESOLVED it is the position of the Chiefs in Assembly that First Nations' traditional values and community laws can only be defined by First Nations who rightfully hold the rights that are associated with our traditions, our land bases, our inherent rights, our Treaty rights and the collective responsibilities inherently owned by our peoples; and

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FINALLY BE IT RESOLVED that the Chiefs in Assembly direct the AFN Executive to bring forward this position to the federal government and engage in discussions with provincial and territorial governments to seek support in opposing the application of provincial laws.

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Phil Fontaine, National Chief

Appendix C.

February 9, 2007
Letter from National Chief Phil Fontaine to Minister Prentice

OFFICE OF THE NATIONAL CHIEF

Assembly of First Nations

BUREAU DU CHEF NATIONAL

Assemblée des Premières Nations

February 9, 2007

The Honourable Jim Prentice, P.C., M.P.
Minister of Indian Affairs and Northern Development
10 Wellington Street
Gatineau QC K1A 0H4

Dear Minister Prentice:

We are writing to inform you of important direction arrived at by the Executive Committee of the Assembly of First Nations (AFN) at our recent meeting on February 5, 2007.

The matter before the Executive Committee related to a resolution of the Special Chiefs Assembly held in December 2006, regarding the Matrimonial Real Property process that was deferred by the Chiefs in Assembly for the further consideration of the Executive Committee. Subsequent to such further consideration, the Executive Committee has adopted this resolution noting that the position set out in the resolution represents the consensus views of First Nations in regard to the Matrimonial Real Property process as a result of both the discussion of the Chiefs-in-Assembly as well as the views expressed through the AFN regional dialogue sessions which concluded on January 31, 2007.

The resolution (#72/2006) consistently reflects the position that has been expressed by the AFN both in writing and through our meetings from the outset of this process. In summary, the resolution rejects the proposed federal options and process, and calls for the process to be re-oriented to fulfill the intentions and approaches established in the *First Nations and Federal Crown Political Accord on the Recognition and Implementation of First Nation governments* (May 2005) including meaningful community-based consultation and accommodation processes and the recognition and implementation of First Nation governments, laws and policies.

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Territory of Akwesasne, RR#3, Cornwall Island, Ontario K6H 5R7 Telephone: (613) 932-0410 Fax: (613) 932-0415

As you will re-call from our correspondence of September 25, 2006, wherein we described our mandate to participate in the initial phases of the process, First Nations clearly stated that the *Accord* establishes the framework to enable and guide policy development through clear principles and cooperative processes. Furthermore, we tabled our position that the report of the Ministerial representative should be considered by the Joint Steering Committee, an established process within the Recognition and Implementation of First Nations Governments framework. Given the fact that you have expressed support for the Joint Steering Committee and your commitment to participate dating back to January 2006 in your address to the British Columbia Summit, it has been our view that this process represents the best and most appropriate vehicle to arrive at mutually acceptable and effective options. By way of your response to our letter, dated November 1, 2006, wherein you stated that INAC is not opposed to this approach, we remain optimistic that such an approach will be supported.

We engaged in the dialogue and information sharing phases of the Matrimonial Real Property process based on the clear understanding that there was no pre-determined outcome and moreover that we would work cooperatively to determine appropriate approaches to address this long-standing issue. While, First Nations remain firmly committed to addressing this situation in an effective and efficient manner, First Nations do not accept the current process.

First Nations are, however, clearly articulating an alternative approach that, in the view of First Nations by way of resolution and outcomes of the regional dialogue session, is an essential requirement to arriving at successful solutions to the issue of Matrimonial Real property. Therefore, First Nations have directed AFN to seek a re-orientation of the current process.

Such re-orientation would allow for the elaboration of processes and principles described under the *Accord* that appropriately frame the issues relating to Matrimonial Real Property and promote the achievement of mutually acceptable outcomes. It is our view that both the shorter term interests of ensuring swift and effective remedy for First Nation families facing difficulties relating to Matrimonial Real Property as well as advancing the longer-term interest of recognizing and implementing First Nation governments can be achieved through a re-orientation of the process.

We would like to meet with you at your earliest convenience to discuss our process concerns. We also wish to advise you that until our process concerns are addressed to our mutual satisfaction, the mandate of AFN officials is limited to advancing the recognition and implementation of First Nations governments and to advance certain non-legislative options.

.../3

We remain fully committed to finding a solution to matrimonial real property issues on reserves. In this regard, we strongly encourage you to meet with us at your earliest convenience so that we address First Nations process concerns and continue to move forward to resolving this issue.

Sincerely,

Phil Fontaine
National Chief

Appendix D.

September 25, 2006
Letter from National Chief Phil Fontaine to Minister Prentice

OFFICE OF THE NATIONAL CHIEF

Assembly of First Nations

BUREAU DU CHEF NATIONAL

Assemblée des Premières Nations

September 25, 2006

Honourable Jim Prentice, MP. PC.
Minister of Indian Affairs and Northern Development
House of Commons
Ottawa ON K1A 0A6

Dear Minister Prentice:

We are writing you in connection with the Special Representative process on matrimonial property, which you announced on June 21, 2006. We are pleased that your government is taking steps to address this important issue and we thank you for inviting the Assembly of First Nations (AFN) to participate in your process.

Enclosed is a copy of an AFN resolution that sets out our mandate to participate in your process. We would like to take this opportunity to elaborate on the parameters of our involvement in your nation-wide consultations on matrimonial real property.

The *First Nations and Federal Crown Accord on the Recognition and Implementation of First Nations Governments* (the Accord) sets out a new framework to guide the policy development process, one that is premised on a joint and cooperative approach. Our participation will be in accordance with the principles and approaches contained in the Accord.

We trust that the results of your proposed consultation and consensus-building processes are not pre-determined and that we will work collaboratively to develop solutions to matrimonial real property issues on reserves, consistent with the true spirit of the Accord. In this regard, we are concerned about your proposed timeframe for completing the work on this matter.

Based on representations made to us by INAC officials and the Ministerial Representative, we understand that the entire process will culminate with the tabling of federal legislation in April or May 2007.

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While we share your view that this is an urgent matter requiring prompt attention, resolving this issue involves complex constitutional and jurisdictional considerations and a multitude of ancillary legal and social issues. In this regard, we have no interest in participating in a process that is directed toward a headlong rush to develop and implement solutions that have not been carefully considered. This would only result in the imposition of greater hardship on First Nations peoples.

As the development of legislation typically can take up to one year or more – especially on a matter as complex as this one - we are concerned that your proposed timeframe for discussions, consensus-building and tabling legislation is too short and rushed. Unless you already have developed legislative options on this matter, it is in our view that you will not be in a position to table legislation in April or May 2007 that will properly address the multitude of issues that must be considered in connection with matrimonial real property interests on reserve lands.

The honour of the Crown is always at stake in dealing with First Nations. At a minimum this requires full disclosure of all relevant information. Therefore, we would ask that you immediately advise us of any legislative options that you have developed, are currently developing or that you plan to develop, and whether such plans are at the concept stage or in the final stages of development. We trust that you will also share with us the information presented to Cabinet on this matter or a summary of its contents so that we can be aware of the motivations and considerations driving the federal process.

We also wish to clarify our understanding of the relationship between your consultation process and the processes for joint policy development that the AFN and the Government of Canada agreed to in the Accord.

You appointed Wendy Grant-John as your Ministerial Representative and have asked her to table a report including possible joint recommendations developed through the consensus-building process. In the spirit of collaborative policy development set out in the Accord, it is our understanding and expectation that after the Ministerial Representative's report has been tabled, you would then bring the report to the Joint Steering Committee for discussion.

We also wish to note that the courts have recognized the existing Aboriginal and Treaty rights of First Nations to their reserve lands. This factor cannot be ignored by your government in the development of options to address matrimonial real property interests on reserve lands. Our Aboriginal and Treaty rights must be accommodated and any proposed legislative solutions that will impact our Aboriginal and Treaty rights will require our consent. Accordingly, we trust that the Crown will conduct the necessary analyses of any potential violations of our Aboriginal and Treaty rights that may arise from legislative options developed by your government.

.../3

We thank you for providing First Nations with resources to develop and advance options for addressing matrimonial real property issues on reserve. We will work diligently to identify and advance options, and we wish to confirm our understanding that our participation in your process is not an acceptance of its premise nor of any pre-determined outcomes.

Sincerely,

Phil Fontaine
National Chief

Appendix E.

November 1, 2006
Letter from Minister Prentice to National Chief Phil Fontaine

Ministre des Affaires indiennes et
du Nord canadien et interlocuteur fédéral
auprès des Métis et des Indiens non inscrits

Minister of Indian Affairs and
Northern Development and Federal Interlocutor
for Métis and Non-Status Indians

Ottawa, Canada K1A 0H4

NOV 0 1 2006

Mr. Phil Fontaine
National Chief
Assembly of First Nations
473 Albert Street, 8th Floor
OTTAWA ON K1R 5B4

Dear Mr. Fontaine:

Thank you for your letter of September 25, 2006, concerning the matrimonial real property (MRP) consultation process. The recent announcement on September 29, 2006, builds upon previous work on this issue by the Assembly of First Nations (AFN), the Native Women's Association of Canada (NWAC), and Indian and Northern Affairs Canada (INAC). The involvement of the AFN has been valuable and will undoubtedly contribute to a sustainable legislative solution for this issue.

Let me assure you that this Government is committed to resolving this issue, so that Aboriginal peoples, especially women and children, living on reserve will no longer be denied access to a fair and just distribution of MRP upon the breakdown of a marriage or common-law relationship. Now is the time to move toward a legislative solution. To this end, the consultation sessions that have now started are scheduled to end in January 2007. They will be conducted concurrently by the three organizations and will inform the final phase of the MRP consultation process.

It is the Government's intention to introduce a legislative solution for MRP in Parliament in the spring of 2007. Let me assure you, however, that this Government does not have a pre-existing solution or legislation already developed to deal with this matter. The continued involvement of Aboriginal organizations and the voices of those affected by MRP will inform the solution for this issue.

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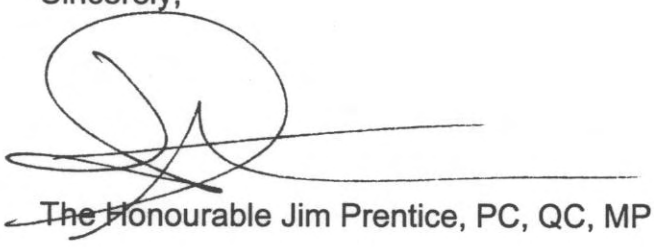
The consultation document, *Seeking Solutions We Can All Live With*, will also contribute to discussions concerning a legislative solution and will be made available for distribution by the AFN. The information contained in this document and the voices and views of Aboriginal peoples will no doubt generate a variety of solutions that will be considered during the consensus-building phase of this consultation process.

Your letter also suggests that the Ministerial Representative's report concerning the consultation process should be discussed by the Joint Steering Committee. INAC is not opposed to this proposal, but it is premature at this time. Moreover, any meeting or discussion by senior officials concerning MRP will have to involve the NWAC and can not delay a legislative solution for this very pressing issue that is to be introduced in the spring of 2007.

Ms. Wendy Grant-John, Ministerial Representative, will ensure that all relevant voices are heard. I look forward to hearing from Ms. Grant-John concerning her efforts and views for moving the MRP issue to a sustainable legislative solution that takes account of the work of AFN, NWAC, and INAC officials.

I welcome your additional views that will ensure that Aboriginal peoples, especially women and children, are afforded the same access and benefit of the law for MRP that is available for other Canadians.

Sincerely,



The Honourable Jim Prentice, PC, QC, MP

Appendix F.

November 20, 2006
Letter from National Chief Phil Fontaine to all Chiefs

OFFICE OF THE NATIONAL CHIEF

Assembly of First Nations

BUREAU DU CHEF NATIONAL

Assemblée des Premières Nations

November 20, 2006

Greeting to all Chiefs:

I am writing to inform you that the Assembly of First Nations (AFN) has begun its nation-wide Regional Dialogue Sessions on the issue of Matrimonial Real Property (MRP) from November 2006 to January 2007. There is a great deal of information on the AFN website, and I encourage you to review it. More information is forthcoming in the near future, but I want to provide some information specifically on the nature of these dialogue sessions.

The MRP initiative was announced by the Minister of Indian Affairs on June 21, 2006. The issue of MRP has been a concern for some time as there currently is no federal legislation in place that determines division of MRP when relationships break down. The problem is yet another result of inadequate and ill-conceived federal legislation being imposed on our communities. Some First Nations have been proactive in creating their own community-driven processes to deal with MRP issues, but then find it difficult to get the federal government to recognize these processes.

The goal of this initiative is to fill the legislative gap with processes and approaches that come directly from First Nations themselves. The Minister of Indian Affairs is proposing to table a report with legislative options in Spring 2007.

The Minister has appointed Wendy Grant-John to act as his Special Representative on this issue. The Native Women's Association of Canada (NWAC) will also be involved in these discussions. NWAC will focus specifically on sessions with First Nations women living on- and off-reserve.

The AFN will be holding Regional Dialogue Sessions with First Nations leaders, citizens, men and women, youth and elders. We want to involve as many of our people as possible in this process. The government created the problem and it is essential that we create the solutions.

Our work will be guided by the recognition and implementation of First Nations government and jurisdiction and the key principle that solution must be First Nations-driven.

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The government has stated it is interested in pursuing one of three options:

i. Application of provincial laws on-reserve
ii. Application of provincial laws with delegated law-making authority for First Nations
iii. Development of federal legislation and delegated law-making authority for First Nations

While these are the options the federal government wants to pursue, the AFN will ensure that our report and recommendations reflect the voice of First Nations, regardless of whether or not that direction is consistent with these options. The AFN's work on MRP is guided by AFN resolution no. 32/2006, calling for the development of options that recognize and respect First Nations governments and jurisdiction.

The AFN is putting forward its own options for consideration. They are by no means the only options but are designed to generate discussion about different approaches:

i. Recognition legislation – enactment of a bill that would provide for recognition of First Nations jurisdiction in regard to MRP issues on-reserve that could pave the way for implementation and enforcement of First Nations MRP laws.

ii. Government-to-Government agreement and implementation legislation – recognition and implementation of First Nations jurisdiction over MRP that would be achieved through three instruments:

   a. government-to-government agreements between the federal government and participating First Nations that set out roles and responsibilities regarding MRP and provide for de facto recognition of First Nations jurisdiction in this area;
   b. federal legislation that ratifies and implements the agreement;
   c. similar legislation by First Nations involved in the agreement, who then set out their own detailed MRP regimes.

iii. Enforcement Options – possible enforcement options First Nations can consider as part of their plan for dealing with MRP issues. These options include things like First Nations courts and/or traditional dispute mechanisms.

.../3

More detail will be provided on each of these options as we begin the Regional Dialogue Sessions. First Nations may prefer one of these options, or may use these options as the basis to develop other approaches, or come up with something completely new. The recommendations that are provided will be the ones that are out into the AFN's report to the Minister's Special Representative.

I must emphasize again that it is important that you and all First Nations citizens make your voices and ideas heard though the dialogue sessions. It is true that the government has a duty to consult with us before embarking on any initiatives that could affect our Aboriginal or Treaty rights. We also have a duty to ensure that we make our concerns known to government. As well, note that any recommendations put forward by the AFN will first need to be endorsed by the Chiefs in Assembly at a Special Assembly to deal with this issue.

It is in that spirit that I encourage you to make your voice heard at the Regional Dialogue Sessions. We need your input, your ideas and your direction. The AFN will strongly reject and oppose any attempt by any government to dismiss or deny the will of First Nations. Equally important, this is an issue that requires our attention and our action because it affects our people, our governments, our families and our future.

Sincerely,

Phil Fontaine
National Chief

Appendix G.

December 1, 2006
Letter from National Chief Phil Fontaine to Minister Prentice

OFFICE OF THE NATIONAL CHIEF

Assembly of First Nations

BUREAU DU CHEF NATIONAL

Assemblée des Premières Nations

December 1, 2006

The Honourable Jim Prentice, P.C., M.P.
Minister of Indian and Northern Affairs
10 Wellington Street
Gatineau, QC K1S 0H4

Dear Minister Prentice:

Thank you for your letter dated November 1, 2006, in which you respond to my letter of September 25, 2006 regarding your government's matrimonial real property (MRP) process.

In your correspondence you note that consultation sessions have now started and will be conducted by the three organizations. You also state that the consultation sessions will inform the final phase of your MRP consultation process. We wish to unequivocally state that the Assembly of First Nations (AFN) is not engaged in consultations with First Nations on behalf of the Crown. This would be contrary to the law, as the Supreme Court of Canada has clearly stated that the Crown cannot delegate its duty to consult to third parties.

Rather, as noted in my previous correspondence to you dated September 25, 2006, the AFN is working diligently to facilitate the search for solutions by assisting with the identification of First Nations interests and developing options consistent with those interests. The AFN is also playing a significant role in informing First Nations people about MRP issues on reserves. Based on our analyses of best practices as well as case law in this area, this role is a pre-requisite to consultation that is both meaningful and efficient.

We fully appreciate the opportunity to assist in performing important facilitative and public education roles. The AFN's role in narrowing and focusing the issues is important due to the diversity among First Nations throughout Canada and the concomitant wide range of potential options that may be required to address these diverse interests.

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However, the AFN's work in this regard must not detract from or replace the Crown's duty to consult with individual First Nations where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal or Treaty rights and contemplates conduct that might adversely affect it.

This view is clearly supported by First Nations who have participated in regional dialogue sessions hosted by the AFN in Saskatchewan, British Columbia, Manitoba, Yukon and the Atlantic. Participants have consistently stated that consultations must be community-based and conducted with individual First Nations who's Aboriginal and Treaty rights may be adversely affected by any proposed legislative solution. Participants have also consistently advised us that the timeframe for your nation-wide process is much too short.

While we share your goal to resolve this matter as expeditiously as possible, in our view it will clearly be impossible for the Crown to fulfill its consultation duties to First Nations by the spring of 2007. We have no interest in delaying resolution of this important issue and will continue to work diligently with you to develop a plan of action to address matrimonial real property issues on reserves including full consideration on non-legislative options and solutions as brought forward through the engagement process.

Progress on this important issue appears to be hampered by your government's lack of a policy for engaging in consultations with First Nations. As we work towards resolving MRP issues on reserves, we would also invite your government to immediately begin working with First Nations to develop a clear, transparent and mutually satisfactory consultation policy and process. This important work can be conducted through the *First Nations and Federal Crown Accord on the Recognition and Implementation of First Nations Governments,* which sets out a framework to guide the policy development process and is premised on a joint and cooperative approach.

As you know, First Nations people have also expressed their unanimous opposition to the application of provincial laws on their lands. This also is reflected in AFN Resolution no. 32/2006. Your remarks, to the Standing Senate Committee on Human Rights on October 30, 2006 are encouraging and lead me to believe that you also see the difficulties inherent in simply imposing provincial legislation upon First Nations.

.../3

I am hopeful that establishing a focus on solutions and an inclusive approach, rather than adherence to rigid timelines and a legislative result as the absolute required outcome, will produce meaningful change and justice for all First Nations people.

Sincerely,

Phil Fontaine
National Chief

Cc. Wendy Grant-John
Beverly Jacobs
Bill Graham (Anita Neville, EA)
Jack Layton (Jean Crowder, EA)
Gilles Duceppe (Marc Lemay, EA)

Assembly of First Nations

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ANNUAL GENERAL ASSEMBLY
July 11, 12, & 13, 2006, Vancouver, BC

Resolution no. 32/2006

SUBJECT:	**MATRIMONIAL REAL PROPERTY**
MOVED BY:	Grand Chief Doug Kelly, Proxy for Shxw'ow'hamel, BC
SECONDED BY:	Dene National Chief NWT, Noeline Villebrun, Proxy for K'atlodeeche (Hay River Dene) FN, NT
DECISION:	On July 13, 2006, the Co-Chair referred draft resolution numbers 1 to 36 to the AFN Executive Committee for their consideration. On July 31, 2006, at a duly convened meeting, the AFN Executive Committee received and affirmed these draft resolutions.

WHEREAS First Nations have the constitutionally protected inherent Aboriginal and Treaty right to regulate all matters relating to the members of their nations, including the division of matrimonial real property on First Nations lands; and

WHEREAS the legislative gap in respect of matrimonial real property laws on First Nations lands represents an intolerable violation of the human rights of First Nations men, women and children, which has resulted in repeated sanctions against the Government of Canada by the United Nations; and

WHEREAS First Nations, through Special Chiefs Assembly March 2005, agreed on the overall vision of recognizing and implementing First Nations Governments and confirmed the appropriate principles and processes to pursue this objective; and

WHEREAS the First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments signed May 31, 2005 establishes an appropriate process for effecting

Certified copy of a resolution adopted on the 31st day of July, 2006 in Winnipeg, MB.

Phil Fontaine, National Chief

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the reconciliation of First Nations and federal Crown jurisdiction over matrimonial real property and joint policy development; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on matrimonial real property; and

WHEREAS the consultation process developed and proposed by the Department of Indian and Northern Affairs (INAC consists of the following phases:

a) Planning and Development – June to August 2006;
b) Consultations – September 2006 to January 2007;
c) Consensus Building – February to April 2007;
d) Tabling of Legislation – April or May 2007. , and

WHEREAS on May 17, 2006 Conservative MP Brian Pallister tabled Bill C-289, which is a private members bill entitled "An Act to amend the Indian Act (matrimonial real property and immovables", which would extend the application of provincial matrimonial property law to reserve lands; and

WHEREAS the federal government intends to table legislation to regulate matrimonial real property rights on reserve lands in April or May, 2007;

THEREFORE BE IT RESOLVED that the Chiefs in Assembly provide a mandate to the National Chief and the Assembly of First Nations to seek a reconciliation of First Nations and Crown jurisdiction over matrimonial real property on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the National Chief and the Assembly of First Nations to secure resources to ensure a First Nation specific process that includes effective and full participation of First Nations in the development of legislative options on matrimonial real property;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that a Matrimonial Real Property Working Group (MRPWG) be established and consist of members from both the AFN Women's Council and the RIFNG Chiefs and Experts Committee;

BE IT FURTHER RESOLVED that the Assembly of First Nations/National Chief/MRPWG undertake and oversee the following activities:

a) to develop legislative and non-legislative options to achieve a reconciliation of First Nations and federal and provincial Crown jurisdiction;
b) that any legislative and non-legislative options developed achieve an appropriate and respectful balance between the collective and individual rights of First Nations citizens/peoples;

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Phil Fontaine, National Chief

c) to seek clarification from the Government of Canada regarding the potential effect, if any of Bill C-289 on the consultation process.

d) to develop and implement a communications strategy to advance the interests of First Nations in regard to matrimonial real property on the domestic and international fronts;

e) to engage in discussions with First Nations and First Nations citizens on legislative options developed to implement First Nations jurisdiction in respect of matrimonial real property interests on First Nations lands, in accordance with the elements of First Nation policy development established by the Assembly of First Nations including, full national dialogue, regional discussions, and First Nations consent.

BE IT FURTHER RESOLVED that the development of options, both legislative and non-legislative, be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments;

BE IT FURTHER RESOLVED that the Chiefs in Assembly unanimously reject the application of provincial matrimonial real property laws on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the Assembly of First Nations/National Chief, as required, to seek additional time to develop legislative options during the Planning Phase of the federal government's proposed consultation process and timeframe;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that any proposed legislation be subject to further consultation and the consent of First Nation Governments prior to application.

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Phil Fontaine, National Chief

Appendix H.

Chiefs of Ontario Resolution 06/88

Chiefs of Ontario

DRAFT

Resolution 06/88

Matrimonial Real Property

WHEREAS the federal government has imposed a consultation process nationally regarding the initiative entitled Matrimonial Real Property (MRP) and this process began on June 21/06;

WHEREAS this consultation process is inclusive of a report with recommendations on solutions by way of the Assembly of First Nations (AFN) and National Women's Association of Canada (NWAC), INAC, and Ministrial representative, Wendy Grant-John;

WHEREAS the planning will commence this year, the Bill is scheduled for April/ May 2007, and these consultations consist of an allocation of $2.7 million over three phases;

WHEREAS there have been national concerns of the short time frame for the completion of consultation by the end of 2006; whereas the regional dialogues are intended to include participants in all matters that touch on Matrimonial Real Property – jurisdiction, Aboriginal title and treaty rights, consultation and accommodations, administration of justice, collective and individual rights, non-band members including residency and inheritance, family violence, land regime and registry issues and the role of housing policies;

WHEREAS First Nations have dealt with Matrimonial Real Property and other family relations since time immemorial, inclusive of practice, custom and tradition integral to Aboriginal Rights;

WHEREAS the Anishinabek Nation Chiefs-in-Assembly have opted to develop their own legislative process to establish an Anishninabek Nation law respecting Matrimonial Real Property that will recognize their own jurisdiction over these complex issues and therefore have opted out of the Chiefs of Ontario consultation process on this matter;

WHEREAS the government of Canada has answered that it will create new federal legislation to address Matrimonial Real Property for on reserve lands;

THEREFORE BE IT RESOLVED that we, the Chiefs in Assembly, reject the unilateral imposition of non-First Nation Matrimonial Real Property laws on-reserve;

BE IT FURTHER RESOLVED that this resolution shall not effect the Anishinabek Nation process and the proposed Anishinabek Nation law respecting Matrimonial Real Property;

BE IT FURTHER RESOLVED that we, the Chiefs-in-Assembly direct that the AFN/INAC and NWAC's consultative process be stopped and be restructured to create an appropriate process and time-frame as directed by the Chiefs in Assembly;
BE IT FURTHER RESOLVED that we, the Chiefs-in-Assembly, reject Ontario's funding allocation to engage in the AFN's regional dialogue sessions;

FINALLY BE IT FURTHER RESOLVED that each Ontario First Nations develop its bona fide and meaningful consultation process and create and recognize its own First Nations law on Matrimonial Real Property.

Moved By: Chief Dave General, Six Nations of the Grand River Territory
Seconded By: Chief Dean Sayers, Ojibways of Batchewana

Appendix I.

AFN Resource Handbook

Matrimonial Real Property on Reserves

Our Lands, Our Families, Our Solutions

Regional Dialogue Sessions Resource Handbook

November 2006

ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

For more information, please contact us at:

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ABOUT THIS RESOURCE HANDBOOK

On June 21, 2006, the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians announced the federal government's nation-wide consultation process on matrimonial real property and appointed Wendy-Grant John as his Ministerial Representative.

Minister Prentice invited the AFN and the Native Women's Association of Canada to identify options to address matrimonial real property issues on reserves. The AFN will engage in dialogue, both regionally and nationally in accordance with the provisions of AFN Resolution No. 32/2006, which calls for the development of options to recognize and implement First Nations jurisdiction over matrimonial real property on reserve lands. A copy of AFN Resolution No. 32/2006 is attached as Annex 2 to this Resource Handbook.

To facilitate the identification of options by First Nations and First Nations citizens, the AFN is coordinating and hosting nation-wide Regional Dialogue Sessions. The sessions will be held from November 2006 to January 2007. This Resource Handbook sets out relevant background information and questions to facilitate dialogue the identification of solutions to address matrimonial real property issues on reserves.

This information contained in this Resource Handbook is not intended to be, nor should it be construed as, or relied upon by any party as a legal opinion. No party should act on information contained in this document without first seeking a legal opinion from their legal counsel regarding any issues addressed in this Resource Handbook.

TABLE OF CONTENTS

INTRODUCTION

LEGISLATIVE GAP ON RESERVES

While First Nations have traditional laws, which could help couples to determine how to divide the family home and land when divorce or separation occurs, the federal government does not recognize these laws. Furthermore, where First Nations have enacted laws to address matrimonial real property issues on reserves, the federal government has rejected these laws because, in their view, they exceed the by-law making powers in section 81 of the *Indian Act*.

As a result of Supreme Court of Canada decisions in *Derrickson v. Derrickson* and *Paul v. Paul*, provincial and territorial matrimonial real property laws do not apply on reserve lands.[i]

Although the federal government can enact laws to address matrimonial real property issues on reserves pursuant to section 91(24) of the *Constitution Act, 1867*, it has chosen not to do so. Consequently, matrimonial real property issues on reserves are not addressed in the *Indian Act* or in any other federal legislation.

These factors have effectively resulted in a legislative gap on reserve in regard to the division of matrimonial real property upon marital breakdown.[ii] The purpose of the Minister's nation-wide process is to address this legislative gap.

MINISTER'S NATION-WIDE PROCESS ON MATRIMONIAL REAL PROPERTY

On June 21, 2006, the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians announced the federal government's nation-wide consultation process on matrimonial real property and appointed Wendy-Grant John as his Ministerial Representative. The Minister's process consists of three phases, namely, a planning and preparation phase, a consultation phase and a consensus-building phase.

Minister Prentice invited the AFN and the Native Women's Association of Canada (NWAC) to identify options to address matrimonial real property issues on reserves. During the consensus-building phase, the Ministerial Representative will work with the AFN, NWAC and Indian and Northern Affairs Canada (INAC) to build consensus among the parties on options identified through the nation-wide process.

Where the parties are unable to reach consensus, the Minister has asked Ms. Grant-John to recommend options, including possible legislative solutions. The Minister intends to table legislation on matrimonial real property in the spring of 2007.

AFN'S ROLE IN THE NATION-WIDE PROCESS

AFN Resolution No. 32/2006 calls for the development of options to recognize and implement First Nations jurisdiction over matrimonial real property on reserve lands.

To facilitate the identification of options by First Nations and First Nations citizens, the AFN is coordinating and hosting nation-wide Regional Dialogue Sessions. The sessions will be held from November 2006 through January 2007 and will be summarized in a final report.

The report will be presented to the Chiefs-in-Assembly at a Special Chiefs Assembly to consider and provide direction on options and recommendations made in the final report. Direction provided by the Chiefs-in-Assembly will form the basis of the AFN's mandate during the Ministerial Representative's Consensus Building Process and subsequent dialogue with the Government of Canada.

IMPORTANCE OF ENSURING THAT YOUR VOICE IS HEARD

The legislative gap in respect of matrimonial real property laws on reserves, together with chronic housing shortages often results in one or both spouses and their children leaving their community in search of alternative housing upon marital breakdown. Without recognized rules in place to assist couples to fairly divide their respective interests in the family home, there is great potential for unsatisfactory outcomes.

The breakdown of a marriage is likely one of the most stressful times in a person's life. The lack of a legislative regime adds to the stress of martial breakdown for First Nations couples and families. Couples on reserves are entitled to certainty. They are also entitled to adequate compensation for their share of the family home so that they can secure adequate housing for themselves and their children upon marital breakdown. Our children are our future and they should be entitled to live in First Nations communities and learn their languages and their cultures.

We must take immediate action to address the flow of First Nations people away from our communities due to chronic housing shortages on reserves and in some instances, due to the legislative gap in respect of matrimonial real property law on reserves. As this issue affects First Nations families and communities, it is important that we hear from all First Nations citizens and leaders.

The Minister has stated unequivocally that he will table legislation in the spring of 2007. This is an equally compelling reason for you to ensure that your voice is heard.

While the federal government is under an obligation to consult with First Nations regarding any proposed decision or action that may impact our Aboriginal or Treaty rights, the courts have stated that First Nations are under a reciprocal obligation to make their concerns known to government, to respond to the crown's attempts to meet our concerns and suggestions, and to try and reach some mutually satisfactory solution. Therefore, if we do not make our concerns known to the government and try and reach some mutually satisfactory solution, we do so to our detriment.

While the crown is under a duty to consult with First Nations, this is not a duty that the crown can take lightly. The courts have held that consultations must be undertaken with the genuine intention of substantially addressing First Nations concerns and that First Nations representations must be seriously considered, and wherever possible, demonstrably integrated into the proposed plan of action. [iii]

We have an opportunity to deal with matrimonial real property issues on reserves in accordance with our rights and responsibilities. Let us seize this opportunity by clearly identifying our preferred solutions and where we have concerns, by making our concerns known to the government.

Imposed solutions do not work. It is essential that First Nations people be involved in developing our own solutions about our families and our lands. Please make sure that your voice is heard.

WHAT IS MATRIMONIAL REAL PROPERTY?

MATRIMONIAL REAL PROPERTY

Matrimonial real property is a legal term used to describe the family home and the land on which it sits. Matrimonial property can also include any other lands that a couple owned before separating or divorcing.

TYPES OF MATRIMONIAL REAL PROPERTY ON RESERVES

What kind of matrimonial real property exists on reserves? Matrimonial real property on reserves includes the family home and may include land held by a couple through a Certificate of Possession or custom allotment.

- **Family Home**

Reserve lands are collectively held by all band members. Section 89(1) of the *Indian Act* expressly prohibits "the real and personal property of an Indian or a band situated on a reserve" from being mortgaged. This measure is designed to protect the collective interest of band members in their reserve lands. Consequently, most couples that want to build or purchase a family home on reserve cannot simply go to a bank to obtain a mortgage to build or purchase a home. Nor are there many couples that can build or purchase a family home without some form of financial assistance. This is particularly true for couples on reserve, where the average income in 2006 was $15,667.

As reserve lands cannot be mortgaged, most couples that want to build or purchase a family home on reserve must obtain a loan or subsidy from their band or the federal government. Family homes on reserve can be classified into three categories of housing:

- **Capital housing***:* Housing paid for by the band member(s) occupying it and for which bank loan may have been obtained or a subsidy from the band. While the band members may own the house, they may be occupying the land under a tenancy agreement with the band to occupy general band land.

- **Social housing***:* Housing owned by the band for which members repay the band and when the house is fully paid off, the band transfers possession to the band member(s).

- **Band-owned rental:** Housing rented from the band. Some bands use tenancy agreements or adopt housing policies that address what happens if the tenants separate.[iv]

- **Certificates of Possession**

A Certificate of Possession is an interest in land on a reserve, which was created by the federal government in the *Indian Act* and entitles the band member named in the certificate to lawful possession of the specific parcel of land described in the certificate. Although any member of a band can apply for a Certificate of Possession, these certificates are issued at the discretion of band councils and must be approved by the Minister. In other words, there is no automatic entitlement for band members to receive Certificates of Possession. Furthermore, a Certificate of Possession, unlike a fee simple interest in land, does not entitle the holder of the certificate to ownership of the land. Instead, according to the *Indian Act*, the federal crown is the legal owner of all reserve lands.

- **Custom Allotments**

A custom allotment is another right of possession to reserve lands that band members can acquire. Custom allotments are allotments of land made by bands or band governments to their members in accordance with their own customs and traditions.

KEY ISSUES AND CONSIDERATIONS

When searching for solutions to matrimonial real property issues on reserves, there are many issues to consider. These relevant key issues and considerations include, but are not limited to the following:

ABORIGINAL TITLE AND TREATY RIGHTS

The courts have confirmed that First Nations have Aboriginal and Treaty rights over our reserve lands.[v] Accordingly, reserve lands are protected by section 35(1) of the *Constitution Act*. This is the fundamental starting point for any discussion on options to address the legislative gap and must be taken into consideration in the search for solutions to matrimonial real property issues on reserves and when evaluating any legislative options that are proposed by the federal government.

CONSULTATION AND ACCOMMODATION

Recent court cases have confirmed that the federal government cannot unilaterally proceed with enacting legislation that has the potential to infringe Aboriginal or Treaty Rights or affect Aboriginal interests without first consulting with First Nations and justifying any potential infringements of our constitutionally protected rights. Furthermore, in some instances, where there is a strong case for the existence of an Aboriginal or Treaty Right, the federal government may even be required to accommodate such rights or obtain the consent of First Nations for any proposed government action, including legislative initiatives. These factors must also be taken into consideration in the search for solutions.

JUDICIAL RECOGNITION OF FIRST NATIONS JURISDICTION OVER LAND USE

There has been judicial recognition of First Nations jurisdiction over land use on reserve lands. For example, in the *Delgamuukw* case, the Supreme Court of Canada held that Aboriginal title, in its full form, includes the right to manage lands held by such title. Custom allotments also form part of First Nations customary law, and it is questionable whether provincial laws can apply to this traditional form of First Nations land management of reserve lands. First Nations jurisdiction over land use on reserves must be taken into consideration in the search for solutions to matrimonial real property law issues on reserves.

JUDICIAL RECOGNITION OF FIRST NATIONS JURISDICTION OVER FAMILY LAW MATTERS

First Nations have traditional laws, customs and practices to address family law matters, which include laws, customs and practices relating to the division of matrimonial property upon marital breakdown. There has been judicial recognition of traditional First Nations family laws, customs and practices (i.e. adoption and marriage). There has also been judicial recognition of First Nations self-government rights by the British Columbia Court of Appeal in the *Campbell* case.

Judicial recognition of the general right of self-government together with judicial recognition of First Nations jurisdiction over a range of family law matters must also be taken into

consideration in discussions with the federal government to identify options to address the legislative gap.

FEDERAL RECOGNITION OF FIRST NATIONS JURISDICTION OVER FAMILY LAW MATTERS

There has been some recognition of First Nations jurisdiction and law-making authority over family law and the division of matrimonial real property by the federal government. This recognition is evidenced in self-government agreements and in the *First Nations Land Management Act* framework agreement and subsequent federal and First Nations legislation enacted to implement the framework agreement. For example, the Meadow Lake agreement provides for exclusive First Nations jurisdiction over all matters relating to matrimonial property on First Nations lands. The *FNLMA* also provides for recognition of custom allotments, which are a form of First Nations traditional or customary law.

The law-making authority of First Nations over family law matters has also been recognized in modern treaties. For example, the jurisdiction of the Nisga'a people over family law matters was recognized in the Nisga'a treaty. The family law provisions of the Nisga'a treaty were among the provisions of the treaty that were unsuccessfully challenged by the Liberal party of British Columbia in the *Campbell* case. In the *Campbell* case, the BC Court of Appeal held that First Nations have an existing inherent right of self-government.

Thus, in addition to judicial pronouncements and constitutional considerations, there are existing precedents that provide for the recognition and implementation of First Nations jurisdiction over the division of matrimonial real property upon marital breakdown. These precedents cannot be ignored in any dialogue with the federal government to identify options to fill the legislative gap.

NATURE OF RESERVE LANDS

The search for solutions is complicated by the legal nature of reserve lands. Both reserve lands and lands held by Aboriginal title are inalienable, except by surrender to the crown. The Supreme Court of Canada in *Delgamuukw* explained the rationale for protecting reserve lands and lands held by Aboriginal title from alienation as follows:

> Alienation would bring to an end the entitlement of aboriginal people to occupy the land and would terminate their relationship with it…

In order to fulfill its responsibility to protect reserve lands from alienation, the crown enacted numerous provisions in the *Indian Act* that are designed specifically to protect reserve lands from alienation.

For example, sections 29 and 89 of the *Indian Act* both protect reserve lands from seizure under legal process. This means that reserve lands cannot be seized and sold to pay any debts owed by band members. Section 89 also prohibits reserve lands from being mortgaged. As reserve lands cannot be mortgaged, most banks are not willing to make loans to Nations borrowers for home purchases on reserves. Furthermore, even where banks are willing to make loans available to First Nations borrowers, sections 29 and 89 prohibit reserve lands from being seized and sold. Thus, even if reserve lands could be mortgaged, banks would still not be able to seize and sell reserve any reserve lands held by Certificates of Possession, custom allotments or otherwise if a band member defaults on his or her mortgage.

In order to further protect reserve lands from alienation, only the band and band members are entitled to possess land on a reserve. For example, section 28(1) of the *Indian Act* provides that any agreement by which a band or band member purports to permit a non-band members to occupy, use or reside on a reserve is void. Section 24 similarly limits the ability of band

members to transfer their interest in Certificates of Possession to the band or another band member only.

First Nations are interested in protecting and preserving First Nations lands for future generations. Ensuring that reserve lands are protected for future generations is the paramount consideration that must be satisfied in the search for solutions to matrimonial real property issues on reserves.

INDIVIDUAL INTERESTS IN RESERVE LANDS – CERTIFICATES OF POSSESSION AND CUSTOM ALLOTMENTS

As noted previously, there are two main types of individual interests in reserve lands that a band member can acquire, namely, a Certificate of Possession or a custom allotment.

A Certificate of Possession, unlike a fee simple interest in land, does not entitle the holder of the certificate to ownership of the land. Instead, the person whose name is listed on the certificate is only entitled to possess the parcel of land described in the certificate.

A custom allotment is another right of possession to reserve lands. Custom allotments are allotments of land made by bands or band governments to their members in accordance with their own customs and traditions.

COLLECTIVE INTEREST OF BAND MEMBERS IN RESERVE LANDS

The members of a band retain collective underlying interests in lands held by individual band members under Certificates of Possession and custom allotments. What is the nature of this collective interest?

Although the federal crown is the legal owner of reserve lands, First Nations collectively own what is known as the beneficial interest in reserve lands. The beneficial interest in reserve lands is another way of saying that all band members are collectively entitled to the use and benefit of their reserve lands.

The courts have also acknowledged that First Nations have Aboriginal Title and Treaty Rights to our reserve lands. Aboriginal Title and Treaty Rights are another form of collective rights that First Nations hold over our reserve lands, and these interests are constitutionally protected by section 35(1) of the *Constitution Act, 1982.*

The "collective" nature of reserve lands is recognition that First Nations societies have their own forms of land tenure and their values and beliefs about lands.

BALANCING COLLECTIVE AND INDIVIDUAL RIGHTS

When searching for solutions to matrimonial real property interests on reserve lands, the collective rights of band members to reserve lands, which are also subject to Aboriginal Title and Treaty Rights must be balanced with any individual rights that a couple may have to possession of reserve lands by a Certificate of Possession or custom allotment.

LAND REGISTRY ISSUES

For a court to make orders about the entitlement of a couple to their respective interests in the family home and any other matrimonial property owned by a couple, it is essential for a judge to be able to verify ownership of such property. For couples off the reserve, the courts rely on provincial land registries, which list the registered owners of all fee simple lands and any charges against such lands.

However, the land registry system for reserve lands is significantly less reliable than most provincial and territorial land registry systems and does not offer indisputable proof of entitlement to possession of reserve lands. Nor is there any legal requirement to list all charges against such interests in lands. Furthermore, while Certificates of Possession must be listed in the Indian Land Registry, custom allotments cannot be registered in the Indian Lands Registry. This limits the ability of the courts and judges to verity the entitlement of couples on reserves to their family home and any lands in their possession through Certificates of Possession or custom allotments.

Therefore, in order to protect other persons who may have an interest in matrimonial real property on reserves, there will need to be significant improvements to the Indian Land Registry system.

NON-BAND MEMBER SPOUSES

As a result of revisions to the membership provisions of the *Indian Act*, a woman no longer has to become a member of her husband's band upon marriage. Nor can non-First Nations spouses acquire Indian status or band membership upon marriage to an Indian spouse. There are numerous provisions in the *Indian Act* that complicate the search for solutions when addressing the rights and interests of non-member spouses when couples on reserves separate or divorce.

The membership status of spouses is a significant factor in the search for solutions, because entitlement to reside on a reserve and obtain the use and benefit of reserve lands is integrally tied to being a member of the band. For example, section 28(1) of the *Indian Act* provides that any agreement by which a band or band member purports to permit a non-band members to occupy, use or reside on a reserve is void. Section 24 of the *Indian Act* limits the ability of band members to transfer their interest in Certificates of Possession to the band or another band member only.

This means that when a couple living on a reserve separates or divorces, the non-member spouse will not be entitled to continue residing in the family home on the reserve or to be in lawful possession of any land held by the couple through a Certificate of Possession or custom allotment. This is because the *Indian Act* is designed to protect reserve lands from alienation and to ensure that these lands are available for the use and benefit of bands and band members only.vi

Thus, even if the remedy of exclusive possession was extended to couples on reserves, non-member spouses may still be precluded from accessing this remedy by virtue of section 28(1) of the *Indian Act*, which renders void any agreement that purports to permit non-band members to reside on the reserve. Nor would any other remedies presently available under provincial or territorial laws assist non-band member spouses who wish to remain in the family home on a reserve, rather than be compensated for his or her share of the family home.

In the Derrickson case, the court held that provincial matrimonial real property laws that authorize courts to make compensation orders apply to reserve lands. Under provincial and territorial matrimonial real property law, where a court orders one spouse to pay the other spouse for his or her interest in any property owned jointly by the couple, this is known as a compensation order. Therefore, there are existing remedies available for non-member spouses who wish to seek compensation for their interest in the family home or any other matrimonial real property located on reserve.

CHILD CUSTODY

Child custody may be a factor that the courts consider when making decisions about who should get temporary possession of the family home when a couple first separates. However, this factor will likely be less significant in influencing the courts when making decisions about who should get the family home upon divorce.

Again, there are numerous provisions in the *Indian Act* that complicate the search for solutions to matrimonial real property issues on reserves, particularly where one of the spouses and some or all of the children of the marriage are not members of the band.

As noted previously, non-member spouses are no longer entitled to reside on a reserve upon marital breakdown and the *Indian Act* prevents non-member spouses from any entitlement to possession of reserve lands through a Certificate of Possession. Therefore, if a court awards custody of the children of the marriage to the non-member spouse, the court would likely be precluded from awarding exclusive possession of the family home to that non-member spouse.[vii] Thus, even if remedies available under provincial and territorial law were extended to couples on reserve, in some circumstances, this would not offer any significant relief or protection to non-member spouses and children.

However, the outcome is different if a band member is awarded custody of non-member children. This is due to section 18.1 of the *Indian Act*, which effectively authorizes any non-member children of a band member or non-member children in the custody of a band member to reside on the reserve.

First Nations have a strong interest in ensuring that First Nations children have an opportunity to live in their communities and learn their languages and their culture. This is an important objective that must be satisfied in any search for solutions to matrimonial real property issues on reserves.

ENTITLEMENT TO MATRIMONIAL REAL PROPERTY ON THE DEATH OF A SPOUSE

The death of a spouse, rather than separation or divorce may also affect the rights and entitlement of a non-member spouse to the family home. Again, to protect reserve lands from alienation and to ensure that reserve lands are preserved for the use and benefit of bands and band members, section 50(1) of the *Indian Act* prohibits any non-band member, including non-member spouses, from acquiring a right to possession of land on a reserve through "devise or descent" upon the death of a band member.

However, section 50(2) of the *Act* entitles any person who receives an interest in reserve lands through "devise or descent" to receive the proceeds of any sale of this interest in reserve lands. Therefore, there are some protections and remedies available to non-member spouses in terms of being compensated for their interest in the family home upon the death of their spouses.

Nevertheless, when searching for solutions to matrimonial real property issues on reserves, it will be important to consider the adequacy of existing remedies that are currently available to non-member spouses in regard to their entitlement to the family home upon the death of their spouses.

DOMESTIC VIOLENCE

A Statistics Canada (1993) survey found that 51% of Canadian women have been physically abused at least once by the age of 16, and 25% of married women have been abused by their spouses.[viii] Rates of domestic violence in First Nations communities are reportedly higher.ix

Ensuring the safety of all First Nations citizens, and particularly First Nations women and children is an important objective that must be achieved in the search for solutions to matrimonial real property issues on reserves.

Family violence in First Nations communities has been described as a "consequence to colonization, forced assimilation, and cultural genocide, the learned negative, cumulative, multi-generational actions, values, beliefs, attitudes and behavioural patterns practices by one or more people that weaken or destroy the harmony and well-being of an aboriginal family, extended family, community or nationhood."[x] These root causes of domestic violence, which contribute to family breakdown in First Nation communities, must be addressed as part of the search for solutions.

Six provinces and one territory have adopted domestic violence legislation, which allows spouses who are victims of domestic violence to apply to court for restraining orders against violent spouses and for orders of temporary exclusive possession of the family home.

Apart from possible enforcement issues, adoption of similar types of remedies for couples on reserve would certainly provide much needed protections to spouses on reserves who are victims of family violence. However, those provisions of the *Indian Act* that are designed to protect reserve lands from alienation and to ensure that reserve lands are preserved for the use an benefit of First Nations would undoubtedly make it difficult to extend this type of remedy to non-member spouses.

Domestic violence is a serious issue that must be addressed as part of the search for solutions to matrimonial real property issues on reserves.

HOUSING SHORTAGES

Chronic housing shortages on most reserves must also be addressed in the search for solutions. While First Nations estimate a shortage of approximately 80,000 housing units on reserve, in 2005 the federal government estimated that housing shortages on reserves were between 20,000 to 35,000 units, which is reportedly growing by a rate of 2,200 units a year.

However, despite efforts by the federal government to invest additional funding to address housing shortages on reserves, based on current funding levels it could take anywhere from 15 to 60 years to resolve current housing shortages. For example, in the 2005 federal budget, the federal government allocated $295 million over five years for on-reserve housing. This funding will provide for the servicing of 5400 building lots and the construction of about 6400 new units over this 5-year period. If the backlog consists of 20,000 units, at a rate of 6400 new units every five years, it will take approximately 15 years to resolve the current backlog. If the backlog is 80,000 units, it will take 62 years to resolve the current backlog.[xi]

Chronic housing shortages on reserves have in turn resulted in overcrowding. An estimated 31% of all homes on reserves are overcrowded. Overcrowding in turn increases the strain on relationships and can thus contribute to increased conflict among spouses and in some cases can result in marital breakdown.

When First Nations couples separate, the lack of alternative and affordable housing often further breaks families apart as one spouse and some or all of their children are forced to leave their community to seek available housing. This in turn contributes to the further breakdown of First Nations communities. Furthermore, the ability of First Nations to address housing backlogs is significantly constrained by the provisions of the *Indian Act* that prohibit reserve lands from being mortgaged or seized.

Chronic housing shortages on reserves and access to capital for First Nations couples to secure alternative housing on reserves upon martial breakdown are key issues which must be addressed in the search for solutions to matrimonial real property issues on reserves.

ACCESS TO JUSTICE

While it is important to ensure that remedies and protections are available to couples on reserve to assist them in dividing the family home when they separate or divorce, it is equally important to ensure that they can access these remedies.

It is costly for couples going through a separation or divorce to seek remedies from the courts. Due to the significantly lower income levels on reserves, it will be even more difficult for most couples on reserves to access any new remedies adopted to assist them in dividing matrimonial real property on reserves upon separation or divorce.[xii] Therefore, where the financial situation of one or both spouses is an issue, it is important that some form of financial assistance be made available to separating or divorcing couples on reserve to ensure that First Nations couples can access remedies.

Furthermore, many reserves and First Nations communities are located in rural and remote areas. This limits the ability of couples on reserve to access the court system and thus seek remedies that may be available to them.

First Nations are interested in meaningful and enforceable solutions. Therefore, ensuring access to the courts and to justice by First Nations is an essential part of the search for solutions to matrimonial real property issues on reserves.

ENFORCEMENT

Once decisions are made about what remedies to extend to couples on reserve, then decisions will have to be made about enforcement of these remedies. Provincial courts play a central role in enforcing remedies available to couples on the reserve through provincial and territorial laws. However, as reserve lands are section 91(24) lands and are also subject to Aboriginal title and Treaty rights, it is questionable whether provincial courts would have jurisdiction to enforce matrimonial real property laws on reserves.

The question of which courts could or should have jurisdiction to enforce matrimonial real property remedies on reserve is a critical question that will have to be addressed in the search for solutions.

GUIDING PRINCIPLES

What principles do we want to guide us in our search for solutions to matrimonial real property issues on reserves?

GUIDING PRINCIPLES IN POLITICAL ACCORD

The Chiefs-in-Assembly, pursuant to AFN Resolution No. 32/2006, directed that "the development of options be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments. A copy of the Political Accord is attached as Annex 3 to this Resource Handbook.

Please see Annex 3 for the relevant principles set out in the Political Accord, which have already been adopted by First Nations and are among the core principles that will guide our search for solutions.

OTHER GUIDING PRINCIPLES

There may be other guiding principles that we may wish to adopt in our search for solutions to matrimonial real property issues on reserves. A list of other possible guiding principles is set out below for your review and consideration:

- **Traditional Values**

Respect for traditional values is an essential consideration in the search for solutions to the legislative gap. We need to apply First Nations solutions that are based on our traditions and acknowledge the traditionally strong role of First Nations women in our communities.

- **Protection of Aboriginal and Treaty Rights**

First Nations have constitutionally protected s. 35 Aboriginal and Treaty rights to our reserve lands. Solutions to the legislative gap should not infringe the constitutionally protected Aboriginal Title and Treaty rights of First Nations to our reserve lands.

- **No Abrogation or Derogation of our Collective Rights**

Section 35 of the *Constitution Act, 1982* protects the collective Aboriginal and Treaty rights of First Nations. While section 15 of the *Charter of Rights* protects individual rights,[xiii] section 25 of the *Constitution Act, 1982* provides that the individual rights guaranteed in the Charter "shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…" Solutions to matrimonial property issues on reserves must not abrogate or derogate from the collective rights of our peoples in our reserve lands and traditional territories.

- **Protection and Preservation of First Nations Lands for Future Generations**

Protection and preservation of reserve lands for future generations is an essential prerequisite in the search for solutions to matrimonial real property issues on reserves.

- **Strengthening First Nations Families and Communities**

To preserve our cultures and strengthen First Nations families, it is essential that solutions enable First Nations children to remain in their communities, live among their extended family, and be taught their culture.

- **Recognition and Implementation of First Nations Jurisdiction**

Solutions must provide for the recognition and implementation of First Nations jurisdiction over matrimonial real property on reserve lands.

- **Community-Based Solutions**

The development of solutions be community-driven and developed by First Nations members. The Aboriginal title and Treaty rights that must be taken into consideration in the search for solutions to matrimonial real property issues on reserves are held collectively by all members of First Nations communities. Thus, all community members must be involved in and participate in the search for solutions.

QUESTIONS FOR CONSIDERATION:

1. Are there any guiding principles outlined above that you do not support?

2. Are there any other guiding principles that should guide the search for solutions to the legislative gap?

GUIDING PRINCIPLES PROPOSED BY THE FEDERAL GOVERNMENT

The federal government prepared a document in September 2006 entitled "Consultation Document – Matrimonial Real Property on Reserves." In addition to setting out the federal government's proposed legislative options to address matrimonial real property issues on reserves, this document also contains some proposed principles to guide the search for solutions. For more information on the options and guiding principles proposed by the federal government, we refer readers to INAC's webpage at www.ainc-inac.gc.ca. A complete copy of the "Consultation Document – Matrimonial Real Property on Reserves" can be found at INAC's webpage.

A requirement for solutions to be "in line with Canadian human rights" and "in line with constitutional law" are among the principles proposed by the federal government to address matrimonial real property issues on reserves. First Nations and the Government of Canada have adopted both of these principles in the Political Accord.

For example, principle 8 of the Political Accord addresses human rights and provides:

> First Nations and Canada are committed to respecting human rights and applicable international human rights instruments. It is important that all First Nation citizens be engaged in the implementation of their First Nation government, and that First Nations governments respect the inherent dignity of all their people, whether elders, women, youth or people living on or away from reserves.

At principle 2, the federal government and First Nations similarly make a joint commitment to uphold constitutionalism and the rule of law. Principle 2 provides, in part, that the "legislation, policies and actions of governments must comply with the Constitution, including section 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights."

PRINCIPLES AND OBJECTIVES OF PROVINCIAL AND TERRITORIAL FAMILY LAW

- **Equal Division of Community Property**

In provincial and territorial matrimonial real property law, there are a couple of fundamental presumptions that underlie all remedies that are available to separating and divorcing spouses. The first presumption is that all property acquired by a couple during the marriage, regardless of who is the registered or legal owner of that property, is considered as marital property or community property that is owned by both spouses. A second presumption that underlies provincial and territorial matrimonial real property law is that upon divorce, all community property is to be divided equally between both spouses.

However, section 48(12) of the *Indian Act* expressly states that "[t]here is no community of real or personal property situated in a reserve." Again, this is yet another provision in the *Indian Act* that is designed to protect reserve lands from alienation and ensure that reserve lands are preserved for the use and benefit of band members. This provision complements sections 24 and 28(1) of the Act, which prohibit non-band members for possessing reserve lands through Certificates of Possession and which render void any agreement by which a band or band member purports to permit a non-band member to reside on a reserve.

Therefore, there are at least two major obstacles that must be addressed if First Nations are interested in adopting the presumption of community property. First of all, the conflict between *Indian Act* provisions designed to protect reserve lands from alienation and application of the presumption of community property in regard to non-member spouses would have to be addressed. The obstacle presented by section 48(12) of the Act would also have to be addressed.

- **"Best Interests of the Child"**

The "best interests of the child" is the standard that the courts follow in making custody determinations. What is in "the best interests of the child" is more or less determined on a case-by-case basis, although there are always certain factors that are considered.[xiv]

Where a separating couple has dependant children, the "best interests of the child" is sometimes taken into consideration by the courts when making decisions about who should get possession of the family home on an interim basis.

This principle already applies to First Nations couples when courts are making custody determinations. Focus on the "best interests of the child" in provincial and territorial family law is also consistent with First Nation interests in ensuring that first Nations children remain in their communities and learn their languages and cultures.

However, the ability of the courts to apply this principle when making decisions about who should get possession of the family home on an interim basis may be restricted by Indian Act provisions that limit the ability of non-member spouses to possess land on a reserve or from residing on the reserve upon marital breakdown.

QUESTIONS FOR CONSIDERATION:

1. Are you willing to adopt the presumption of "equal entitlement to community property" for couples on reserves?

2. If yes, how can reserve lands be protected from alienation and preserved for the use and benefit of band members if non-member spouses are presumed to own a one-half or 50% interest in a family home located on reserve or in a Certificate of Possession or custom allotment that is registered or issued in their spouse's name?

3. If it is in the "best interests of the child" to award custody to a non-member spouse, but that spouse is not entitled to reside on the reserve or to possess land or the family house on the reserve, how can we meet the objective of ensuring that First Nations children are afforded an opportunity to remain in their communities and to learn their languages and cultures?

4. In your view, are the interests of non-member spouses adequately protected by compensation orders, which would entitle the spouse to an amount of money equal to one-half or 50% of the value of the family home upon divorce?

5. Would you be willing to adopt a policy or law that would allow non-member spouses to reside in your community and remain in the family home for a defined period of time so that children of the marriage could remain in the community?

6. Are there any other solutions that you would recommend to balance collective and individual rights in regard to matrimonial real property issues?

REMEDIES

In searching for solutions to address matrimonial real property issues on reserves, First Nations will have to determine what remedies to make available to separating and divorcing couples.

TRADITIONAL FIRST NATIONS REMEDIES

Many First Nations have traditional laws, customs and practices to assist couples in deciding who gets the family home and land held by the couple under a Certificate of Possession or a custom allotment. First Nations traditions and customs vary from region to region and from nation to nation. Therefore, it is not possible to summarize all of the various remedies traditionally utilized in each First Nations community in this Resource Handbook.

Furthermore, if we support the notion that solutions to matrimonial real property issues must be developed by First Nations communities, then it will be up to each First Nation community to decide which of its traditional laws, customs and practices that it wishes to incorporate into any new regime developed to address matrimonial real property issues on their reserves.

QUESTIONS FOR CONSIDERATION:

1. Should it be up to each First Nation community to decide which of its traditional laws, customs and practices that it wishes to incorporate into any new regime developed to address matrimonial real property issues on their reserves?

REMEDIES AVAILABLE THROUGH PROVINCIAL AND TERRITORIAL LAWS

There are various remedies that are typically available to separating and divorcing couples under provincial and territorial matrimonial real property law. Remedies currently available under provincial and territorial matrimonial real property law include, but are not limited to the following:

- **Possession of the Matrimonial Home**

When a couple first separates, one of the first things that they will have to decide is who gets to live in the family home until they decide whether to get back together or to divorce one another. When the couple can't agree, they can ask the court to assist them in determining who gets to live in the family home. Under provincial and territorial matrimonial real property law, where a court makes an order that one spouse gets possession of the family home, to the exclusion of the other spouse, this is known as an order for exclusive possession.

- **Partition and Sale of the Family Home**

Later, if the couple decides to divorce, they will have to decide who gets the family home and any other land that the couple may own together. Sometimes spouses can't agree on whether to sell or keep the family home or divide the property. Partition is a legal term used to describe an application to court for an order to divide property and is usually relied on when co-owners of property can't agree on whether to sell, keep or divide the property. Under provincial and territorial law, where one spouse does not want to sell the family home, the other spouse can apply for partition and sale of the family home. Normally, a partition order provides for an appraisal of the total property, which sets the price for one of the parties to buy out the other's half.

Due to chronic housing shortages on reserves, if one spouse forces the other spouse to sell the family home on reserve, the entire family may be forced to leave the community to seek alternative housing. In this regard, partition and sale can potentially be used as a tool of

oppression by one spouse against the other. Therefore, before adopting this remedy, First Nations may want to carefully consider checks and balances that can be put in place to prevent partition and sale from being used as a tool of oppression.

Compensation orders can achieve the same effect as orders for partition and sale. In particular, a compensation order, like an order for partition and sale will result in the spouse seeking the order being paid an amount equal to one half or 50% of the value of the family home. The advantage of seeking a compensation order rather than an order for partition and sale is that the former remedy does not require sale of the family home.

- **Preventing Sale of the Family Home**

Sometimes, one spouse will attempt to sell the house without the other spouse's consent. Under provincial and territorial law, where one spouse is concerned that the other spouse will try and sell the family home, he or she can apply for a court order to prevent the sale of the family home.

- **Compensation Orders**

One spouse may wish to continue living in the family home, while the other spouse may be interested in being compensated for his or her interest in the family home. Under provincial and territorial matrimonial real property law, where a court orders one spouse to pay the other spouse for his or her interest in any property owned jointly by the couple, this is known as a compensation order. In the *Derrickson* case, the court held that provincial matrimonial real property laws that authorize courts to make compensation orders apply to reserve lands.

However, because reserve lands are not subject to seizure or sale, spouses who are awarded compensation orders often experience considerable difficulties in enforcing such orders. As reserve lands are not mortgageable, lack of access to capital often makes it difficult for spouses with matrimonial real property on reserves to satisfy the terms of compensation orders made against them.

QUESTIONS FOR CONSIDERATION:

1. Should couples on reserves be able to seek and obtain orders for exclusive possession of the family home?

2. Should there be special rules apply where domestic violence is a factor in marital breakdown?

3. Should non-member spouses be able to seek and obtain orders for exclusive possession of the family home?

4. Should couples on reserves be able to seek and obtain orders for partition and sale of the family home?

5. As there are chronic housing shortages on most reserves, what further protections would be required to prevent partition and sale from being used as an oppressive tool?

6. Should couples on reserve be able to seek and obtain orders preventing sale of the family home by their spouses?

OPTIONS AND SOLUTIONS

FIRST NATIONS LEGISLATIVE OPTIONS

The AFN's mandate on matrimonial real property issues is set out in AFN Resolution No. 32/2006. This resolution calls for the development of options to recognize and implement First Nations jurisdiction over matrimonial real property on reserve lands. The development of legislative and non-legislative options by the AFN was conducted in accordance with the mandate set out in Resolution 32/2006.

The AFN has identified the following options for your consideration. These options are designed to facilitate the recognition and implementation of First Nations jurisdiction over matrimonial real property on reserve lands and related issues.

- **Recognition Legislation – AFN Option No. 1**

Enactment of a recognition bill is a possible option for addressing matrimonial real property issues on reserve. The recognition bill would provide for recognition of First Nations jurisdiction in regard to matrimonial real property issues on reserves and would pave the way for implementation and enforcement of First Nations matrimonial real property laws.

- **Government-to-Government Agreement and Implementation Legislation – AFN Option No. 2**

Under this option, recognition and implementation of First Nations jurisdiction over matrimonial real property on reserves would be achieved through three instruments.

The first instrument would be a government-to-government agreement between the federal government and participating First Nations and would set out the roles and responsibilities of the parties in regard to matrimonial real property issues on reserves. This agreement would effectively provide for de facto recognition of First Nations jurisdiction over matrimonial real property matters on reserve lands.

The second instrument would be federal legislation to ratify and implement the government-to-government agreement.

The third class or category of instrument would be legislation enacted by each participating First Nation to ratify and implement the government-to-government agreement. Legislation enacted by participating First Nations would also set out detailed provisions to assist couples on reserve, upon marital breakdown, in dividing the family home and any other matrimonial real property acquired by the couple during their marriage.

- **Enforcement Options – AFN Option No. 3**

There are a number of possible enforcement options that First Nations may wish to consider and adopt as part of their regimes for regulating the disposition of matrimonial real property on reserve lands. One option is set out below for your consideration.

- **First Nations Courts and Traditional Dispute Resolution Mechanisms:** Under this option, traditional dispute resolution mechanisms would be relied on or First Nations courts would be established to enforce First Nations matrimonial real property laws and mediate dispute among First Nations couples.

QUESTIONS FOR CONSIDERATION:

1. What are your thoughts on AFN Option No. 1?

2. What are your thoughts on AFN Option No. 2?

3. What are your thoughts on the enforcement options set out at AFN Option No. 3?

4. What other options would you recommend to achieve recognition and implementation of First Nations jurisdiction over matrimonial real property on reserves?

5. What other options would you recommend to enforce First Nations matrimonial real property laws on reserve lands?

FEDERAL GOVERNMENT LEGISLATIVE OPTIONS

In its September 2006 document entitled "Consultation Document – Matrimonial Real Property on Reserves" the federal government proposes three legislative options for addressing the legislative gap in respect of matrimonial real property on reserves.

The AFN does not want to misrepresent the content of any of these options, and would therefore refer readers to INAC's webpage at www.ainc-inac.gc.ca where a copy of the federal government's "Consultation Document – Matrimonial Real Property on Reserves" can be found. A complete description of the federal government's proposed legislative options is set out in this document. Copies of the "Consultation Document – Matrimonial Real Property on Reserves" will also be made available to participants at AFN Regional Dialogue Sessions.

Any reference to the federal government's options in this Resource Handbook is not intended to be, nor should it be interpreted as AFN or First Nations endorsement of any of the legislative options proposed by the federal government. The AFN and First Nations reserve the right to identify any First Nations concerns with the federal government's legislative options and to make these known to the federal government.

The three legislative options proposed by the federal government can be summarized as follows:[xv]

- **Application of Provincial Laws – Federal Option No. 1:**

The first option proposed by the federal government would provide for federal incorporation of provincial and territorial laws on reserves.[xvi] The Chiefs-in-Assembly unanimously rejected the application of provincial law in AFN Resolution No. 32/2006 as a solution to addressing matrimonial real property issues on reserves.

- **Application of Provincial Law and Delegated Law Making Authority – Federal Option No. 2:**

The second legislative option proposed by the federal government would similarly provide for the incorporation of provincial and territorial matrimonial real property laws on reserves. In addition to incorporating provincial and territorial matrimonial real property laws on reserve, under this option the federal government would also put in place "a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property."[xvii]

Under this option, provincial laws would apply unless and until a First Nation developed its own matrimonial real property laws pursuant to any authority delegated to it by the federal government.[xviii]

As noted previously, the Chiefs-in-Assembly unanimously rejected the application of provincial law in AFN Resolution No. 32/2006.

- **Federal Legislation and Delegated Law Making Authority – Federal Option No. 3**

The third option proposed by the federal government would involve the development of "substantive" federal legislation. Like the second option, this option would also put in place "a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property."

Under this option, federal matrimonial laws developed by the federal government would apply unless and until a First Nation developed its own matrimonial real property laws pursuant to any authority delegated to it by the federal government.[xix]

As noted previously, while the federal government is under an obligation to consult with First Nations regarding any proposed decision or action that may impact our Aboriginal or Treaty rights, the courts have stated that First Nations are under a reciprocal obligation to make their concerns known to government and to respond to the crown's attempts to meet our concerns and suggestions.

QUESTIONS FOR CONSIDERATION:

1. What are your concerns with Federal Option No. 1? What changes would you propose to Federal Option No. 1 to address your concerns?

2. What are your concerns with Federal Option No. 2? What changes would you propose to Federal Option No. 1 to address your concerns?

3. What are your concerns with Federal Option No. 3? What changes would you propose to Federal Option No. 1 to address your concerns?

NON-LEGISLATIVE OPTIONS

- **Prenuptial and Separation Agreements**

In most jurisdictions, people can enter into contracts before marriage takes place, which will govern the division of property if the marriage breaks down. These are called prenuptial agreements. They can also enter into agreements after separation. These are called separation agreements.

It is only in circumstances where there is no agreement between spouses that reliance on matrimonial real property law is required to assist couples in finding a fair division of matrimonial property. In other words, the existence of a legislative gap is a much greater concern where couples have not entered into prenuptial agreements that set out how they will divide any property that they may own upon marital breakdown.

Therefore, a large part of the solution may lie in informing First Nations couples about their rights upon entering into marriage or other relationships and upon marital breakdown, including the option of entering into prenuptial agreements.

However, in order to succeed, such a public education campaign would have to be carried on over several years and would only assist First Nations citizens who have not yet entered into any form of marital relationship. Thus, successful implementation of this option would require

adequate funding to launch and carry out a sustained public education campaign over a number of years.

Some First Nations citizens may also have cultural biases against the use of agreements to address property rights before or after marriage. Any cultural biases against the use of agreements to address property rights may also have to be addressed as part of any public education campaign.

*QUESTIONS FOR CONSIDERATION***:**

1. Do you think that part of the solution lies in launching a public education campaign to inform First Nations peoples about the use of prenuptial and separation agreements to provide for a division of their matrimonial real property interests in the family home or land on a reserve?

- **Spousal Compensation Loan Fund**

While couples on reserve can presently seek and obtain compensation orders in respect of matrimonial real property on reserves, prohibitions against mortgaging reserve lands and lack of access to capital often makes it difficult for spouses to comply with such orders. Thus access to this remedy has not resulted in any increased protection for First Nations couples.

Due to chronic housing shortages on reserves, it is vital that a solution be found to the challenges experienced by First Nations couples in complying with compensation orders. Otherwise, the flow of First Nations citizens from our communities in search of housing will continue unabated.

The solution lies in securing access to capital for couples on reserve, which can be achieved by the establishment of a Spousal Compensation Loan Fund by the federal government. Loans could be granted to band members on reserve who are in the process of divorcing their spouses. This would provide band members with the ability to compensate their spouses for their fair share of the family home and any Certificates of Possession or custom allotments acquired by the couple during their marriage.

*QUESTIONS FOR CONSIDERATION***:**

1. Do you support the establishment of a Spousal Compensation Loan Fund by the federal government?

2. Are there any other options that you would suggest to address the lack of access to capital for First Nations couples due to the non-mortgageability of reserve lands?

- **On-Reserve Housing Loan Fund**

As noted previously, at current rates of funding it could take anywhere between 15 to 60 years to reduce the current backlog of housing shortages on reserves. As reserve lands are not mortgageable, the failure of the federal government to make sufficient resources available to resolve housing shortages on reserves is tantamount to enforced assimilation, as First Nations citizens are forced away from their communities to find housing or escape overcrowding in First Nations communities.

It is not acceptable that First Nations should have to wait 15 to 60 years for existing housing shortages to be addressed. The federal government is arguably under a fiduciary duty to address chronic housing shortages in First Nations communities within a reasonable period of

time. First Nations are not interested in government handouts and would support the establishment of an On-Reserve Housing Loan Fund.

*QUESTIONS FOR CONSIDERATION***:**

1. Do you support the establishment of an On-Reserve Housing Loan Fund?

2. Are there any other options that you would suggest to deal with chronic housing shortages in First Nations communities and the lack of access to capital that faces First Nations citizens due to the non-mortgageability of reserve lands?

- **Women's Shelters**

INAC's Family Prevention Program has an annual budget of about $18.5 million. This includes funding for a network of 35 shelters across Canada of approximately $11.5 million per year and about $7 million per year for community-driven family violence prevention projects in First Nations communities.

Minister Prentice recently announced a one-time investment of $6 million for 2006-07 to address the immediate needs of existing shelters and help First Nations communities improve family violence prevention programs and services.

While the annual budget for INAC's Family Prevention Program and the recent one-time investment of $6 million to address the needs of the existing 35 shelters across Canada is much needed and greatly appreciated by First Nations communities, more shelters are needed. With only 35 shelters to service 633 First Nations across Canada, there are many First Nations families who are unable to seek the supports offered by the existing 35 shelters.

*QUESTIONS FOR CONSIDERATION***:**

1. Are more women's shelters required for First Nations communities?

- **Alternate Dispute Resolution**

Alternate dispute resolution is increasingly being relied on to resolve family law disputes. Some First Nations have been very creative in their use of alternative dispute resolution to address family law matters in their communities. For example, the Siksika First Nation has entered into an arrangement with the provincial courts in Alberta, which allows provincial court judges, with the consent of the parties, to refer family law matters (custody, access, maintenance) to the Siksika First Nation's traditional mediation system for resolution. Where the parties reach consensus, this consensus can be captured in a consent order and filed with the court. Alternate dispute resolution can similarly be relied on to resolve disputes among couples on reserves over the division of matrimonial property.

*QUESTIONS FOR CONSIDERATION***:**

1. Do you support the use of alternate dispute mechanisms to assist in resolving disputes between couples regarding the division of matrimonial real property on reserves?

- **Video Court for Remote Communities**

To improve access to justice for First Nations couples in remote communities, the federal government may wish to make funds available for the establishment of video courts to enforce matrimonial real property laws on reserves. Provincial court judges could be appointed to hear

family law matters that don't involve any disputes over matrimonial real property on reserves. Federal court judges could be appointed to the video court to hear disputes involving the division of matrimonial real property on reserves. If video courts are established, couples on reserves would thus not have to leave their communities in order to seek relief from the courts in regard to family law matters. This would greatly improve access to justice for remote communities.

QUESTIONS FOR CONSIDERATION:

1. Do you support the establishment of video courts for remote communities to improve access to justice for First Nations couples?

2. Are there any other options that you would suggest to deal with access to justice issues for First Nations couples in remote communities?

- **Family Law Legal Aid Fund**

To further improve access to justice for couples on reserves, the federal government may wish to establish a Family Law Legal Aid Fund that couples in financial need can draw on when seeking orders in respect of matrimonial real property interests on reserves upon separation or divorce.

QUESTIONS FOR CONSIDERATION:

1. Do you support the establishment of a Family Law Legal Aid Fund that First Nations couples in financial need can draw on when seeking orders in respect of matrimonial real property interests on reserves upon separation or divorce?

2. Are there any other options that you would suggest to deal with access to justice issues for First Nations couples?

- **Treatment Facilities**

First Nations are interested in strengthening First Nations families and communities. Therefore, First Nations have a strong interest in public education to prevent the incidence of domestic violence in First Nations communities, which in turn may reduce rates of marital breakdown among First Nations families.

Where domestic violence occurs, First Nations are interested in making treatment available for those couples that want to preserve their relationship and provide a stable and nurturing environment for their children.

QUESTIONS FOR CONSIDERATION:

1. Do you think that part of the solution lies in launching a public education campaign to address family violence in First Nations communities?

2. Do you support the establishment of more treatment facilities for First Nations couples experiencing family violence who wish to preserve their marriage and provide a stable and nurturing environment for their children?

3. Are there any other options that you would suggest to address family violence in First Nations communities?

- **Self-Government Agreement**

Some First Nations have concluded self-government agreements with the federal government that provide for the recognition of First Nations jurisdiction in regard to family law matters, including the division of matrimonial real property upon marital breakdown.

Although it is not clear whether the federal government will enter into any new negotiations with First Nations to conclude self-government agreements, a First Nation could initiate talks with the federal government to conclude a self-government agreement to address matrimonial real property issues on reserves.

- **First Nation Land Management Act**

The *First Nations Land Management Act* (FNLMA) is a federal law enacted in 1999 that ratifies a1996 *Framework Agreement on First Nations Land Management* between the federal government and 14 First Nations. Signing the *Framework Agreement* is the first step to having the *First Nations Land Management Act* apply to a First Nation.

Once the FNLMA applies to a First Nation, Indian Act provisions relating to land management no longer apply to that First Nation's reserve lands. The FNLMA also recognizes the authority of First Nations to enact rules and procedures "in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests in first nation land".

First Nations that are interested in assuming control of their reserve lands and matrimonial real property issues on reserves may wish to consider signing on to the *Framework Agreement*.

- **First Nations Housing Policies**

Some First Nations have undertaken their own initiatives to address matrimonial property issues. For example, the Mistawasis and Squamish First Nations have adopted housing policies that specifically contain provisions relating to the disposition of matrimonial real property upon marital breakdown.

The *Mistawasis First Nation Housing Policy* says that in cases of conflict or separation of a common-law union or marriage, "the title of ownership of a Band and/or CMHC [Canada Mortgage and Housing Corporation] unit shall be made to that spouse which shall have the greatest need for the said unit in the opinion of the Housing Authority."[xx]

The *Squamish Nation Housing Policy* addresses the interests of non-member spouses. While persons who are not members of the Squamish Nation generally have no legal interests or rights in any residence or lot, there are special rules for non-member former spouses who are primary caregivers of minor children or dependent adults. In such cases, the non-member former spouse is entitled to remain in the on-reserve residence until the minor children or dependent adults are able to care for themselves or no longer reside with the non-member former spouse.[xxi] Apart from these situations, a non-member former spouse must vacate the residence within three months of the dissolution of the marriage or relationship.[xxii]

First Nations who wish to address matrimonial real property issues on reserves can also do so through the adoption of housing and other policies that contain provisions relating to the division of matrimonial real property on marital breakdown.

HOW CAN YOU PROVIDE US WITH YOUR INPUT?

There are at least three ways that you can provide us with your input on this important issue:

- **Regional Dialogue Sessions**

The Assembly of First Nations will be holding Regional Dialogue Sessions across Canada between November, 2006, and January 2007. If you have been invited to a Regional Dialogue Session in your region, during these sessions, you will have an opportunity to provide your thoughts and opinions on possible solutions to the matrimonial real property issue.

- **On-Line Questionnaire**

The questions set out in this Resource Handbook are summarized at Annex 1. These questions are also set out in an On-Line Questionnaire that is posted on our website at www.afn.ca. You can provide us with your input by completing the On-Line Questionnaire.

- **Mail-in Questionnaire**

You can also participate by completing the Mail-in-Questionnaire that is attached to this Resource Handbook and mailing the questionnaire to us at:

Assembly of First Nations
473 Albert Street
Ottawa, ON K1R 5B4

- **Contact Information**

If you have any questions or concerns, please contact us at:

Assembly of First Nations
473 Albert Street
Ottawa, ON K1R 5B4

Telephone: 613-241-6789
Toll-Free: 1-866-869-6789
Fax: 613-241-5808

ANNEX A SUMMARY OF LIST OF QUESTIONS FOR CONSIDERATION

1. Are there any guiding principles outlined above that you do not support?

2. Are there any other guiding principles that should guide the search for solutions to the legislative gap?

3. How can we achieve a balance between the collective right of all band members to their reserve lands with the individual interests of separating couples in lands held by a Certificate of Possession or custom allotments?

4. Are you willing to adopt the presumption of "equal entitlement to community property" for couples on reserves?

5. If yes, how can reserve lands be protected from alienation and preserved for the use and benefit of band members if non-member spouses are presumed to own a one-half or 50% interest in a family home located on reserve or in a Certificate of Possession or custom allotment that is registered or issued in their spouse's name?

6. If it is in the "best interests of the child" to award custody to a non-member spouse, but that spouse is not entitled to reside on the reserve or to possess land or the family house on the reserve, how can we meet the objective of ensuring that First Nations children are afforded an opportunity to remain in their communities and to learn their languages and cultures?

7. In your view, are the interests of non-member spouses adequately protected by compensation orders, which would entitle the spouse to an amount of money equal to one-half or 50% of the value of the family home upon divorce?

8. Are there any other solutions that you would recommend to balance collective and individual rights in regard to matrimonial real property issues?

9. Would you be willing to adopt a policy or law that would allow non-member spouses to reside in your community and remain in the family home for a defined period of time so that children of the marriage could remain in the community?

10. Should it be up to each First Nation community to decide which of its traditional laws, customs and practices that it wishes to incorporate into any new regime developed to address matrimonial real property issues on their reserves?

11. Should couples on reserves be able to seek and obtain orders for exclusive possession of the family home?

12. Should non-member spouses be able to seek and obtain orders for exclusive possession of the family home?

13. Should there be special rules apply where domestic violence is a factor in marital breakdown?

14. Should couples on reserves be able to seek and obtain orders for partition and sale of the family home?

15. As there are chronic housing shortages on most reserves, what further protections would be required to prevent partition and sale from being used as an oppressive tool?

16. Should couples on reserve be able to seek and obtain orders preventing sale of the family home by their spouses?

17. What are your thoughts on AFN Option No. 1?

18. What are your thoughts on AFN Option No. 2?

19. What are your thoughts on the enforcement options set out at AFN Option No. 3?

20. What other options would you recommend to achieve recognition and implementation of First Nations jurisdiction over matrimonial real property on reserves?

21. What other options would you recommend to enforce First Nations matrimonial real property laws on reserve lands?

22. What are your concerns with Federal Option No. 1? What changes would you propose to Federal Option No. 1 to address your concerns?

23. What are your concerns with Federal Option No. 2? What changes would you propose to Federal Option No. 1 to address your concerns?

24. What are your concerns with Federal Option No. 3? What changes would you propose to Federal Option No. 1 to address your concerns?

25. Do you think that part of the solution lies in launching a public education campaign to inform First Nations peoples about the use of prenuptial and separation agreements to provide for a division of their matrimonial real property interests in the family home or land on a reserve?

26. Are there any other options that you would suggest to address the lack of access to capital for First Nations couples due to the non-mortgageability of reserve lands?

27. Do you support the establishment of a Spousal Compensation Loan Fund by the federal government?

28. Do you support the establishment of an On-Reserve Housing Loan Fund?

29. Are there any other options that you would suggest to deal with chronic housing shortages in First Nations communities and the lack of access to capital that faces First Nations citizens due to the non-mortgageability of reserve lands?

30. Are more women's shelters required for First Nations communities?

31. Do you support the use of alternate dispute mechanisms to assist in resolving disputes between couples regarding the division of matrimonial real property on reserves?

32. Do you support the establishment of video courts for remote communities to improve access to justice for First Nations couples?

33. Do you support the establishment of a Family Law Legal Aid Fund that First Nations couples in financial need can draw on when seeking orders in respect of matrimonial real property interests on reserves upon separation or divorce?

34. Are there any other options that you would suggest to deal with access to justice issues for First Nations couples in remote communities?

35. Do you think that part of the solution lies in launching a public education campaign to address family violence in First Nations communities?

36. Do you support the establishment of more treatment facilities for First Nations couples experiencing family violence who wish to preserve their marriage and provide a stable and nurturing environment for their children?

37. Are there any other options that you would suggest to address family violence in First Nations communities?

ANNEX B Annual General Assembly Resolution No. 32/2006

Assembly of First Nations
Annual General Assembly Resolution no. 32/2006
July 11, 12, & 13, 2006, Vancouver, BC

SUBJECT:	**MATRIMONIAL REAL PROPERTY**
MOVED BY:	Grand Chief Doug Kelly, Proxy for Shxw'ow'hamel, BC
SECONDED BY:	Dene National Chief NWT, Noeline Villebrun, Proxy for K'atlodeeche (Hay River Dene) FN, NT
DECISION:	On July 13, 2006, the Co-Chair referred draft resolution numbers 1 to 36 to the AFN Executive Committee for their consideration. On July 31, 2006, at a duly convened meeting, the AFN Executive Committee received and affirmed these draft resolutions.

WHEREAS First Nations have the constitutionally protected inherent Aboriginal and Treaty right to regulate all matters relating to the members of their nations, including the division of matrimonial real property on First Nations lands; and

WHEREAS the legislative gap in respect of matrimonial real property laws on First Nations lands represents an intolerable violation of the human rights of First Nations men, women and children, which has resulted in repeated sanctions against the Government of Canada by the United Nations; and

WHEREAS First Nations, through Special Chiefs Assembly March 2005, agreed on the overall vision of recognizing and implementing First Nations Governments and confirmed the appropriate principles and processes to pursue this objective; and

WHEREAS the First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments signed May 31, 2005 establishes an appropriate process for effecting the reconciliation of First Nations and federal Crown jurisdiction over matrimonial real property and joint policy development; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on matrimonial real property; and

WHEREAS the consultation process developed and proposed by the Department of Indian and Northern Affairs (INAC consists of the following phases:

a) Planning and Development – June to August 2006;
b) Consultations – September 2006 to January 2007;
c) Consensus Building – February to April 2007;
d) Tabling of Legislation – April or May 2007. , and

WHEREAS on May 17, 2006 Conservative MP Brian Pallister tabled Bill C-289, which is a private members bill entitled "An Act to amend the Indian Act (matrimonial real property and immovables", which would extend the application of provincial matrimonial property law to reserve lands; and

WHEREAS the federal government intends to table legislation to regulate matrimonial real property rights on reserve lands in April or May, 2007;

THEREFORE BE IT RESOLVED that the Chiefs in Assembly provide a mandate to the National Chief and the Assembly of First Nations to seek a reconciliation of First Nations and Crown jurisdiction over matrimonial real property on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the National Chief and the Assembly of First Nations to secure resources to ensure a First Nation specific process that includes effective and full participation of First Nations in the development of legislative options on matrimonial real property;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that a Matrimonial Real Property Working Group (MRPWG) be established and consist of members from both the AFN Women's Council and the RIFNG Chiefs and Experts Committee*;*

BE IT FURTHER RESOLVED that the Assembly of First Nations/National Chief/MRPWG undertake and oversee the following activities:

a) to develop legislative and non-legislative options to achieve a reconciliation of First Nations and federal and provincial Crown jurisdiction;
b) that any legislative and non-legislative options developed achieve an appropriate and respectful balance between the collective and individual rights of First Nations citizens/peoples;
c) to seek clarification from the Government of Canada regarding the potential effect, if any of Bill C-289 on the consultation process.
d) to develop and implement a communications strategy to advance the interests of First Nations in regard to matrimonial real property on the domestic and international fronts;
e) to engage in discussions with First Nations and First Nations citizens on legislative options developed to implement First Nations jurisdiction in respect of matrimonial real property interests on First Nations lands, in accordance with the elements of First Nation policy development established by the Assembly of First Nations including, full national dialogue, regional discussions, and First Nations consent.

BE IT FURTHER RESOLVED that the development of options, both legislative and non-legislative, be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments;

BE IT FURTHER RESOLVED that the Chiefs in Assembly unanimously reject the application of provincial matrimonial real property laws on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the Assembly of First Nations/National Chief, as required, to seek additional time to develop legislative options during the Planning Phase of the federal government's proposed consultation process and timeframe;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that any proposed legislation be subject to further consultation and the consent of First Nation Governments prior to application.

ANNEX C A First Nations - Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments

Whereas First Nations and Canada agree on the importance of achieving recognition and implementation of First Nation governments through constitutionally consistent and principled approaches;

Whereas the Prime Minister, at the April 19, 2004 Canada – Aboriginal Peoples Roundtable, stated, "It is now time for us to renew and strengthen the covenant between us", and committed that "No longer will we in Ottawa develop policies first and discuss them with you later. The principle of collaboration will be the cornerstone of our new partnership.";

Whereas the Supreme Court of Canada has in numerous cases referred to reconciliation as the basic purpose of section 35 of the *Constitution Act, 1982*, including the following statements:

"S.35(1) provides the constitutional framework through which Aboriginal peoples who lived on the land in distinctive societies with their own practices, traditions and culture are acknowledged and reconciled with the sovereignty of the Crown." (Van der Peet); and,

"Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s.35 of the Constitution A ct, 1982. Section 35 represents a promise of rights recognition. ... This promise is realized and sovereignty claims reconciled through the process of honourable negotiation." (Haida);

Whereas First Nations and Canada recognise that evolving jurisprudence is creating pressure for new approaches for achieving reconciliation;

Whereas First Nations and Canada agree that these new approaches must be grounded in the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, and the Supreme Court of Canada has stated;

"Section 35(1) of the Constitution Act, 1982, at the least, provides a solid constitutional base upon which subsequent negotiations can take place …. (Sparrow);

Whereas the Royal Commission on Aboriginal Peoples concluded that "the Aboriginal peoples of Canada possess the right of self determination"; First Nations and Canada recognize that policy development will also be informed by discussions and agreements at the international level involving Canada with respect to the rights of indigenous peoples including the right to self-determination;

Whereas First Nations and Canada recognize the importance of strong First Nation governments with recognized rights of self-government in achieving political, social, economic and cultural development and improved quality of life;

Whereas First Nations and Canada recognize that access to, sharing, and benefit from lands and resources contribute to sustainable governments, including First Nations governments and that the Royal Commission on Aboriginal Peoples noted the importance of increased access to, and benefit from, land and resources in contributing to the implementation of First Nation governments; and

Whereas First Nations and Canada share a common interest in ensuring public understanding of, and support for self-government.

THE PARTIES AGREE AS FOLLOWS:

"**Parties**" means the Assembly of First Nations, directed by the chiefs in Assembly, and Her Majesty the Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development (hereinafter referred to as "Canada"), as authorized by Cabinet.

For the purpose of this Accord, "First Nations" and "First Nation peoples" means the "Indian" peoples as referred to in section 35(2) of the *Constitution Act, 1982*.

The intent and purpose of this Accord is to commit the Parties to work jointly to promote meaningful processes for reconciliation and implementation of section 35 rights, with First Nation governments to achieve an improved quality of life, and to support policy transformation in other areas of common interest, affirming and having regard to the following principles.

Principles: Each of the principles below are to be read together, and are mutually supportive and interdependent.

1. Upholding the Honour of the Crown
Cooperation will be a cornerstone for partnership between Canada and First Nations. This requires honourable processes of negotiations and respect for requirements for consultation, accommodation, justification and First Nations' consent as may be appropriate to the circumstances. Upholding the honour of the Crown is always at stake in the Crown's dealings with First Nation peoples.

2. Constitutionalism and the rule of law
Section 52(1) of the *Constitution Act, 1982*, provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The legislation, policies and actions of governments must comply with the Constitution, including section 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights, and the rule of law.

3. Canadian Federalism, pluralism and First Nation Diversity
Canada is a federal state and in this regard Canada – First Nation relations and the respect for section 35 rights are important to the operation of the Canadian federation and to meeting the challenge of accommodating pluralism within the Canadian Constitutional framework. Accommodating pluralism requires respect for the diversity of First Nation peoples who have lived since time immemorial on the land in distinctive societies with their own culture, practices and traditions, including lawmaking powers.

4. Mutuality
The renewed relationship should be based on mutuality, taking into account the four principles expressed by the Royal Commission on Aboriginal Peoples:
- Mutual Recognition;
- Mutual Respect;
- Sharing; and
- Mutual Responsibility.

5. Recognition of the Inherent Right of Self-Government and Aboriginal Title
The inherent right of self-government and Aboriginal title are existing Aboriginal rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. Aboriginal title together with the inherent right of self-government includes the right to make decisions respecting land, and the right to political structures for making those decisions.

6. Implementation of the treaty relationship
Implementation of the treaty relationship must be informed by the original understandings of the treaty signatories, including the First Nations' understanding of the spirit and intent.

7. Compliance with the Crown's Fiduciary Responsibilities
The Crown must uphold its fiduciary relationship with First Nation peoples and fulfill its fiduciary duties.

8. Human Rights
First Nations and Canada are committed to respecting human rights and applicable international human rights instruments. It is important that all First Nation citizens be engaged in the implementation of their First Nation government, and that First Nation governments respect the inherent dignity of all their people, whether elders, women, youth or people living on or away from reserves.

9. Implementation of First Nation governments and socio-economic development
Implementation of strong First Nations governments is important for sustainable economic and social development, and for improving the quality of life for First Nation peoples to standards enjoyed by most Canadians. Evidence from international development consistently points to good governance as a key component of developing strong, healthy and prosperous communities. Key factors in ensuring that First Nation governments in this respect include inherent jurisdiction, capable governing institutions and cultural match. The implementation of strong First Nation governments with appropriate capacity and resources results in communities that are the vehicle of development, and that partner with other governments and the private sector to improve social and economic conditions in their communities.

10. Traditional forms of government, First Nation languages and traditional teachings
Implementation of First Nation governments will require recognition of the importance of First Nation languages, traditional teachings and traditional forms of government in ensuring the vitality of First Nation cultures, societies and governments.

11. The Special Relationship with the Land
First Nation peoples have a special relationship with the land, which is a connection that is not just economic, but also social, cultural and spiritual. Based on their belief that their lands were a gift from the Creator that need to be protected for present and future generations, for First Nation peoples the special relationship with the land also implies a responsibility for environmental stewardship.

THE PARTIES COMMIT TO THE FOLLOWING:
1. Establishment of a Joint Steering Committee with representation from the Parties. The Committee will undertake and oversee joint action and cooperation on policy change, including the establishment of a framework or frameworks, to promote meaningful processes for the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments. The Committee will contribute to relationship renewal through consideration of:

a) New policy approaches for the recognition and implementation of First Nation governments, including mechanisms for managing and coordinating renewed and ongoing intergovernmental relationships, and assessment of the potential for a 'First Nation Governments Recognition Act';

b) New policy approaches to the implementation of treaties;

c) New policy approaches for the negotiation of First Nation land rights and interests;

d) A statement of guiding principles for reconciling section 35 rights in the context of ongoing relationships with First
Nation peoples, their governments, and Canada; and

e) New or existing opportunities to facilitate First Nations governance capacity-building, working with First Nations communities and organizations to jointly identify approaches that support the implementation of First Nations governments, including program, policy, institutional and legislative initiatives.

Discussions on these topics should draw, in part, upon the report *Our Nations, Our Governments: Choosing Our Own Paths*, the "*Penner Report*" and the work of the Royal Commission on Aboriginal Peoples on restructuring the relationship with First Nations.

2. To develop the modalities of a cooperative approach to policy development, as set out in 'Appendix 1' to this *Accord*.

THE PARTIES ACKNOWLEDGE THAT:
1. This *Accord* does not abrogate or derogate from Aboriginal and Treaty rights, recognised and affirmed by s. 35 of the *Constitution Act, 1982*.

2. This *Accord* will only apply to those First Nations who have consented to its application.

3. Discussions pursuant to this *Accord* are to enhance and support negotiations and processes and are without prejudice to, and not intended to replace or supersede any existing initiatives between the Government of Canada and First Nations, or provincial or territorial governments where they are involved, without the consent of the affected First Nations.

4. The actions contemplated in this Accord will begin on signing and the Joint Steering Committee shall report annually on progress to the Chiefs in Assembly and the Minister.

Signed in Ottawa on

For Her Majesty The Queen In Right Of Canada

_____
The Minister of Indian Affairs and Northern Development

On behalf of the Assembly Of First Nations

_____
National Chief Phil Fontaine / Assembly of First Nations

Appendix 1

COOPERATIVE POLICY DEVELOPMENT BETWEEN THE ASSEMBLY OF FIRST NATIONS AND THE GOVERNMENT OF CANADA

Strengthening Policy Development

1. The Minister and the Assembly of First Nations commit to undertake discussions:
• on processes to enhance the involvement of the Assembly of First Nations, mandated by the Chiefs in Assembly, in the development of federal policies which focus on, or have a significant

specific impact on the First Nations, particularly policies in the areas of health, lifelong learning, housing, negotiations, economic opportunities, and accountability; and,
• on the financial and human resources and accountability mechanisms necessary to sustain the proposed enhanced involvement of the Assembly of First Nations in policy development.

2. Nothing in this Appendix is intended to derogate or detract from the work of, or resources for, the Joint Steering Committee or the principles detailed in the *Accord*.

[i] While provincial and territorial matrimonial property law currently applies to personal property interests of "Indians" living on reserves, such legislation currently does not apply to reserve lands.
[ii] However, some First Nations that are self-governing as well as some that are managing their land under the *First Nations Land Management Act* have passed their own matrimonial real property laws or codes.
[iii] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, (1999), 178 D.L.R. (4th) 666 (B.C.C.A.); *Mikisew Cree First Nation v. Canada*, [2002] 1 C.N.L.R. 169 (F.C.T.D.).
[iv] *Dunstan v. Dunstan* (2002) 100 British Columbia Law Reports (3d) 156 (B.C.S.C)
[v] See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 120; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 379.
[vi] This is confirmed by section 18(1) of the *Indian Act*, which provides: " Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band."
[vii] This is due to provisions in the *Indian Act* that are designed to protect reserve lands from alienation and ensure that they are preserved for the use and benefit of band members.
[viii] See A.C. Hamilton and C.M. Sinclair (Commissioners), *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*. (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991), at 22-4 1.
[ix] For example, a study conducted by the Ontario Native Women's Association reported that 80% of Aboriginal women were victims of violence. This study is referred to at p. 9 of the *Manitoba Justice Inquiry Report.*
[x] Health Canada-National Clearinghouse on Family Violence, *Family violence in Aboriginal Communities: An Aboriginal Perspective* (Ottawa: Health Canada, 1996), p. 1.
[xi] These projections do not account for annual increases in the shortage of housing units, which is growing by a rate of 2,200 a year.
[xii] The average income on reserves was $15,667.in 2006.
[xiii] Section 15(1) of the *Charter of Rights and Freedoms* provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
[xiv] The various factors that are generally considered include the following:
1. The fitness of the parents.
2. The character and reputation of the parents.
3. The natural parents' desires based on any agreements between them.
4. The possibility of maintaining natural family relations.
5. The child(ren)'s preference if old enough and able to make a rational judgment.
6. Material opportunities that will affect the child's future life.
7. The age, health, and sex of the child.
8. Where each parent lives and the feasibility of the non-custodial parent visiting.
9. Amount of time the child has been separated from the natural parent who is seeking custody.
10. The impact of a prior voluntary abandonment or surrender of custody.

[xv] For a complete description of this option, please see INAC's "Consultation Document – Matrimonial Real Property on Reserves." A copy of this document can be found in this document INAC's webpage at www.ainc-inac.gc.ca.
[xvi] Ibid.
[xvii] Supra, endnote xii.
[xviii] Ibid.
[xix] Ibid.
[xx] *Mistawasis First Nation #103 Housing Policy*, online: Mistawasis First Nation <http://www.mistawasis.ca/publicworks/housing_policy.htm> in the section entitled: "Marriage Conflicts" (unnumbered section).

[xxi] *Squamish Nation Housing Policy* (approved October 10, 2001 and revised February 12, 2003), online: Squamish Nation Network http://www.squamish.net/PDF/news/bulletins/Housing_Policy.pdf, article 13.4 (a) (I).
[xxii] *Ibid.*, article 13.4 (b).

Appendix J.

AFN Resource Handbook – Quebec Addendum

Resource Handbook Addendum

MATRIMONIAL REAL PROPERTY IN QUÉBEC

1. INTRODUCTION

The Assembly of First Nations (AFN) has developed a Resource Handbook[1] on the issue of matrimonial real property on reserves. This Resource Handbook was prepared to assist in the coordination and hosting of nation-wide Regional Dialogue Sessions and to stimulate discussions on the:

> *development of options to recognize and implement First Nations jurisdiction over matrimonial real property on reserve lands.*[2]

The social and legal background to the issue of matrimonial real property on reserves has been presented in the Resource Handbook.

The purpose of this Resource Handbook Addendum is to provide the Quebéc law relevant to the issue of matrimonial real property.

2. DISTINCTIONS IN QUÉBEC LAW

(a) Property and Civil Rights

Property and civil rights in the Province of Quebéc are governed by the Civil Code of Quebéc[3] (hereinafter the "Code"). The Code is a comprehensive written code of rules derived from the civil law of France. It is divided into 10 "books" addressing issues such as the Family, Persons, Property, Successions, etc.

At the time of Confederation, each province retained its existing law which in Quebéc was the civil law.[4] The rules enunciated in the Code are the foundation for law or legislation in Quebéc.

In the preliminary section of the Code, the underlying philosophy of the Code is described as follows:

> *"The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.*

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[1] AFN, Regional Dialogue Sessions Resource Handbook "Matrimonial Real Property on Reserves: Our Lands, Our Families, Our Solutions (Ottawa: AFN, 2006).
[2] Supra, section entitled "ABOUT THIS RESOURCE HANDBOOK" which refers to AFN Resolution No. 32/2006.
[3] C.C.Q., S.Q. 1980, c-39.
[4] Hogg, Peter W., Constitutional Law of Canada 2nd edition (student) (Carswell: Toronto, 1985), 30.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it."

Divorce is granted in accordance with the *Divorce Act* which is federal law and jurisdiction.[5] The *Divorce Act*[6] does provide for real property division or partition between spouses as this is provincial jurisdiction under section 92 (13) of the *Constitution Act, 1867* ("property and civil rights").[7]

(b) <u>Kinds of Property</u>

In Quebéc law, property is either immovable or movable[8].

For the purposes of matrimonial real property on reserves, a general outline of the property law in Quebéc is needed to understand the distinctions. Sections of the Code relevant to this topic include the following:

899. Property, whether corporeal or incorporeal, is divided into immovables and movables.

900. Land, and any constructions and works of a permanent nature located thereon and anything forming an integral part thereof, are immovables.

904. Real rights in immovables, as well as actions to assert such rights or to obtain possession of immovables, are immovables.

905. Things which can be moved either by themselves or by an extrinsic force are movables.

907. All other property, if not qualified by law, is movable.

In general, **immovables** are land and include buildings and items permanently attached to the land. Real rights and remedies to assert these rights or obtain possession of immovables are immovables also. The concept of immovable is equivalent to the common law concept of real property.

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[5] C.C.Q. article 517.
[6] R.S., 1985, c-3 (2nd Supp.).
[7] 1867, R.S.C. 1985, App. II No. 5.
[8] Book Four "Property" C.C. Q. articles 899 et seq.

Movables are things which can be moved or anything not designated in law as an immovable. The concept of movable is equivalent to the common law concept of personal property.

Thus, matrimonial real property would be considered an immovable in Quebéc law. Any remedies respecting the possession, use or rights to possession, and use of matrimonial real property, would be considered immovables or real property.

(c) First Nations Communities

Certain articles in the Code[9] specifically address First Nations communities:

> *152. In Cree, Inuit or Naskapi communities, the local registry officer or another public servant appointed under any Act respecting Cree, Inuit and Naskapi native persons may be authorized, to the extent provided by regulation, to perform certain duties of the registrar of civil status.*
>
> *Within the context of an agreement concluded between the Government and a Mohawk community, the registrar of civil status may agree with the person designated by the community to a special procedure for the transmission of information concerning marriages solemnized in the territory defined in the agreement and for the transmission of declarations of birth, marriage or death concerning members of the community, as well as for entry in the register of the traditional names of the members of the community.*
>
> *366. […] In the territory defined in a agreement concluded between the Government and a Mohawk community, the persons designated by the Minister of Justice and the community are also competent to solemnize marriages.*

These articles do not directly affect spousal rights to matrimonial real property on reserves. They are provided as a precedent by which amendments have been made to the Code for the purpose of respecting traditional practices in First Nations communities in Quebéc.

In the *James Bay and Northern Quebéc Agreement* (JBNQA), Canada has the administration, management and control of Category 1A lands. Only Cree members are permitted to reside on these lands. Quebéc retains bare ownership of these lands and, subject to other provisions, ownership of the mineral and subsurface rights.[10]

Throughout the JBNQA, there are numerous references to the *Indian Act.* For instance, certain protections and rights, such as exemption from seizure and taxation, for Category 1A lands are to be similar to those under the *Indian Act*. The JBNQA is similar to the

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[9] C.C. Q. articles 152 and 366.

[10] JBNQA, S.C. 1976-77, c.32, Section 5 Land Regime, s. 5.1.1 Category 1A Lands.

Indian Act regarding the issue of matrimonial real property: there are no provisions for a matrimonial real property regime for spouses living on Category 1A lands.

The *Cree Naskapi Act*, is similar to the JBNQA with respect to Category 1A lands.[11] In addition, this Act provides for a land registry system and a succession regime (ie. wills and estates) for property. The land registry system is silent on registration of a family residence or any other spousal real rights.[12] In the event of an intestacy (ie. a person dies without leaving a will) the succession regime recognizes the unmarried spouse or consort as a lawful heir (but both spouses must be unmarried). In addition, there is provision for the disposition of traditional property by a family council limited to movable or personal property.[13]

The *Cree Naskapi Act* provides the unmarried spouse with a right to a share of the estate as a lawful heir. This is the only effect with respect to matrimonial real property on Category 1A lands. Thus, Cree spouses living on these lands will likely encounter the same issues respecting matrimonial real property as other married spouses on reserves in Quebéc.

3. MATRIMONIAL REAL PROPERTY LAW IN QUEBEC

The rules regarding matrimonial real property are contained in Book Two, of the Code, entitled "The Family".[14] These articles are comprehensive and govern marriage and its solemnization, rights and duties of spouses, family residence, family patrimony, compensatory allowance, matrimonial regimes, partnership of acquests, separation as to property, community regimes, separation from bed and board, dissolution of marriage, civil union, filiation, adoption, obligation of support, parental authority and successions.

For the purposes of matrimonial real property on reserves, reference is made only to the articles of the Code affecting this issue in family matters.

(a) Spousal Rights to Family Patrimony

In the section on family patrimony, articles 414, 415, 416 and 423 provides the principles regarding the family patrimony which affect matrimonial real property:

> *414. Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property.*

[11] Cree-Naskapi (of Quebec) Act, 1984, c. 18, s. 2 Definitions
[12] Supra, ss. 150-153.
[13] Supra, ss. 173 et seq.
[14] Book Two "The Family", C.C.Q., articles 365 et seq.

415. The family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them,...[15]

416. In the event of separation from bed and board, or the dissolution or nullity or a marriage, the value of the family patrimony of the spouses, after deducting the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it, is equally divided between the spouses or between the surviving spouse and the heirs, as the case may be.

423. *The spouses may not, by way of their marriage contract or otherwise, renounce their rights in the family patrimony.*

424. Renunciation by one of the spouses, by notarial act, of partition of the family patrimony may be annulled by reason of lesion or any other cause of nullity of contracts.

431. Any kind of stipulation may be made in a marriage contract, subject to the imperative provision of law and public order.

516. Marriage is dissolved by the death of either spouse or by divorce.

Thus, an equal share of the family patrimony is an absolute right of the spouses as a matter of public order and cannot be derogated by agreement of the spouses even by marriage contract for a separate property regime.

The courts have held that family residences can include the hunting and fishing camp, vacation or secondary home, if it is used for family purposes.[16]

This right to family patrimony can be exercised by the surviving spouse upon the dissolution of the marriage which includes the death of a spouse against the estate or succession.

(b) <u>Property of the Marriage</u>

If the spouses have not chosen their matrimonial regime such as a separate property regime in a marriage contract[17], they are subject to the regime of partnership of acquests.[18] This regime applies to property not considered family patrimony.

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[15] Other property listed is movable or personal property such as furniture and cars for family purposes and certain pension and retirement plans.

[16] Ciotola, P., *La patrimoine familial, perspectives doctrinales et jurisprudentielles* (Wilson & Lafleur : Montreal, 2004) 84.

[17] C.C.Q., article 485.

[18] C.C.Q., article 432.

Under this regime, property is either[19]:

- ***private property*** and is not subject to the matrimonial regime; private property has usually been acquired by the spouse before the marriage or acquired by succession or inheritance;

- ***acquests*** which is property subject to the matrimonial regime and is not the private property of the spouse.

Once the value of the acquests is established, it is evenly divided between the spouses.[20] Thus, even real property or immovables acquired for business, traditional and recreational pursuits by one of the spouses would be subject to the partition of acquests between the spouses in absence of a marriage contract.

4. REMEDIES

(a) Protection of the Family Residence

In the section on rights and duties of spouses, the following articles provide rules for the family residence and its protection:

> *392. The spouses … are bound to live together.*
>
> *395. The spouses choose the family residence together. In the absence of an express choice, the family residence is presumed to be the residence where the members of the family live while carrying on their principal activities.*

Without the consent of both spouses, the family residence cannot be alienated, charged or leased or if a leased residence, it cannot be sublet, transferred, or terminated by the spouse owner or spouse lessor.[21] This can be enforceable against third parties by a declaration of family residence registered against the real property or immovable which can be made by both spouses or either of them[22].

(b) Provisional or Interim Measures

An application for separation from bed and board releases the spouses from the obligation to live together.[23] The court may order either spouse to leave the family residence during the proceedings.[24]

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[19] C.C.Q., articles 448 to 460.
[20] C.C.Q., article 481.
[21] C.C.Q., articles 403, 404, 405 and 406.
[22] C.C.Q., article 407.
[23] C.C.Q., article 499.
[24] C.C.Q., article 500.

(c) Compensatory Allowance

In the event of separation from bed and board, divorce or nullity of marriage, if one spouse has been enriched by the work or contributions of the other spouse, the court may order that one spouse pay compensation to the other spouse. If there is no agreement as to payment, the court may award rights in property.[25]

(d) Award of Ownership of the Family Residence

In the event of separation from bed and board, divorce or nullity of a marriage, the court may, upon the application of either spouse, award to the spouse of the lessee the lease of the family residence or the right of use of the family residence to the spouse to whom it awards custody of a child.[26]

A judgment awarding a right of use or ownership is equivalent to title and has the effects thereof.[27]

5. RELATED ISSUES

(a) Mediation

Since time immemorial, the concept of mediation or non-adversarial resolution of conflicts has been integral to the culture and traditions of First Nation communities. Reference is made to this source in a leading guide for mediators in Quebéc. [28]

Since the 1980's, mediation has been utilized as an alternative to resolving disputes in the courts especially in family matters in Quebéc.[29]

If there are disputes between the spouses on issues such as family patrimony, there can be no hearing by the court except for interim or provisional measures and remedies. The spouse or spouses must first attend an information session on the mediation process and a mediator's report must be filed with the court.[30]

Mediation is not obligatory and either spouse may give a valid reason for not attending mediation. This reason can be given to the mediator of choice and the mediator does not have to disclose the reason in the report to the court.

The Family Mediation Service pays the fees of the mediator for a prescribed number of sessions with the spouses.

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[25] C.C. Q., articles 427 and 429.
[26] C.C.Q., article 409 and 410.
[27] C.C.Q., article 413.
[28] Lambert, D., and Berube, L., La Mediation familiale, guide du mediateur (CCH : Brossard, 2004), 21.
[29] Supra, 22
[30] Code of Civil Procedure, R.S.Q., c-25, sections 814.3 to 814.14.

The court may take the mediated agreement of the spouses into account in any proceedings respecting the dissolution of the marriage.[31]

(b) Civil Union Spouses

It should be noted that the Code provides for spouses in a **civil union** which is a commitment by two persons 18 years or older who wish to live together with the same effects of marriage and same rights and obligations.[32]

A civil union must be contracted openly before an official competent to solemnize marriage.[33]

Articles 521.6 and 521.8 apply the same rules to civil union spouses regarding the family residence and its protection and family patrimony as those for married spouses.

In absence of a marriage contract, the matrimonial regime of partnership of acquests applies to the property of the civil union spouses.[34]

Thus, civil union spouses who live on reserve will encounter the same issues respecting matrimonial real property as other married spouses on reserve in Quebéc.

(c) Common Law or De facto Spouses

There are no provisions in the Code for the matrimonial real property for common law or de facto spouses. If the spouses do not have joint title or provide for rights in immovables or real property by domestic contract, they are considered separate as to property and have no remedies regarding the family residence or other family immovables or real property under the family law of Quebéc.

6. CONCLUSION

The Supreme Court of Canada determined that provincial matrimonial real property laws do not apply to reserve lands since it is the federal Crown's responsibility to make laws for "Indians and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*.[35] The federal Crown has not lived up to its responsibility as evidenced by the lack of provisions respecting matrimonial real property under the *Indian Act.*[36]

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[31] C.C.Q., article 504.
[32] C.C.Q., articles 521.1 et seq.
[33] C.C.Q., article 521.2
[34] C.C.Q., article 521.8.
[35] *Derrickson* v. *Derrickson* [1986] 1 S.C.R. 285.
[36] R.S.C. 1985, c. I-5.

Family matters are integral to the culture and survival of First Nations. Traditional principles focus on the protection of the land base for the future generations. Spouses are responsible to take care of each other and their children, elders and disabled.[37]

First Nations communities have implemented partial solutions within the boundaries of their limited jurisdiction via housing policies and forms of alternative dispute resolution. However, if one spouse refuses to respect community solutions these solutions can be rendered inoperative.

The principles in Quebéc family law are similar to those in other jurisdictions in Canada with respect to matrimonial real property, with some distinctions, and different terminology which are focused on the individual rights of the spouses. Quebéc law provides for protection of the family residence and awards of real rights in the family residence and matrimonial real property to the spouses even if ownership is held by one spouse. But the negative effects for spouses living on reserve are the same in Quebéc as the rest of Canada.

As per the Supreme Court of Canada[38], Quebéc family law is provincial matrimonial real property law and cannot be applied to reserve lands in Quebéc. Spousal rights and remedies in matrimonial real property in Quebéc law would be, for the most part, rendered inoperative if the real property or immovables are located on reserve.

The courts could order one spouse to leave the family residence but this is only an interim and temporary measure until the final proceedings.[39] No real right is granted in the family residence on reserve.

The other remedy could be monetary compensation awarded to the creditor spouse against the debtor spouse who holds the title to the immovables (or real property) on reserve. No real rights in the matrimonial property on reserve can be awarded to the non-titled spouse under either the Code or *Indian Act*.

It is ironic that when matrimonial real property is located off-reserve, spouses have a right to an equal share of the property and remedies to enforce and protect their rights. Spouses and their families may have no choice but to leave their communities. This endangers the survival of the culture and language of the community for future generations. First Nations thus have a strong incentive to find solutions respecting the issue of matrimonial real property on reserves.

[37] Assembly of First Nations, Panel of Experts Meeting on Matrimonial Real Property (Ottawa: December 4, 2006).
[38] Supra note 27, *Derrickson*.
[39] C.C.Q., articles 499 and 500

7. ISSUES IN QUEBEC FOR DISCUSSION

(a) What types of solutions to the matrimonial real property problem has your community implemented? Has it helped all spouses who are experiencing a breakdown of the marriage or relationship?

(b) Should spouses on reserve have an absolute right to an equal share of the family patrimony (consisting of the family residence and other types of real property to be defined)?

(c) Should spouses living in communities be subject to a matrimonial regime, if there has been no contract for separate property?

(d) Should spouses living in communities have a right to register a declaration of family residence to prevent the sale or disposal of the residence?

(e) Should spouses living in communities have an effective mechanism to exercise their right to compensation for their share of matrimonial real property?

(f) Should spouses living in communities be encouraged to use mediation services or some type of traditional dispute resolution in the event of marriage breakdown?

(g) If the spouses living in communities cannot resolve their real property issues, what forum or court should make a decision? Could this be a specialized tribunal or court held by a First Nations adjudicator who would understand the community traditions and culture?

(h) Should civil union spouses living in communities have the same rights to matrimonial real property as married spouses?

(i) Should common law or de facto spouses living in communities have the rights to matrimonial real property as married spouses?

(j) In relation to all the previous questions, what happens in the case of non-member spouses and matrimonial real property in the communities?

Appendix K.

Frequently Asked Questions

Frequently Asked Questions

What is matrimonial real property?

Matrimonial real property is a term used to describe the family home and the land that it sits on, or any other land that is owned by a couple.

What is the Minister's consultation process about?

On June 21, 2006, the Minister of Indian Affairs announced a nation-wide consultation process on matrimonial real property. The purpose of the consultation process is to find solutions to the legislative gap that exists on reserves in respect of matrimonial real property laws. This legislative gap exists due to a number of factors.

First of all, while First Nations have traditional laws, which could help couples to determine how to divide up the family home and land when divorce or separation occurs on reserves, these traditional laws are not recognized by the federal government.

Secondly, where First Nations have enacted laws to address matrimonial real property issues on reserves, the federal government has rejected these laws because, in their view, they exceed the by-law making powers in section 81 of the *Indian Act*.

Thirdly, as a result of the 1986 Supreme Court of Canada decisions in *Derrickson v. Derrickson* and *Paul v. Paul*, provincial and territorial laws that are designed to assist couples in deciding how to divide the family home and land owned by a couple when the separate or divorce do not apply on reserve lands.

Fourthly, although the federal government is authorized under section 91(24) of the *Constitution Act, 1867* to enact laws to address matrimonial real property issues on reserves, these issues are not addressed in the *Indian Act* or in any other federal legislation.

Finally, recent court cases have confirmed that the federal government cannot unilaterally proceed with enacting legislation that has the potential to infringe Aboriginal or Treaty Rights or affect Aboriginal interests without first consulting with First Nations and justifying any potential infringements of their constitutionally protected rights.

Furthermore, in some instances, where there is a strong case for the existence of an Aboriginal or Treaty Right, the federal government may even be required to accommodate such rights or obtain the consent of First Nations for any proposed government action, including legislative initiatives.

These factors have effectively resulted in a legislative gap on reserve in regard to the division of matrimonial real property upon marital breakdown. The federal government launched the nation-wide consultation process to find solutions to address this gap.

Who will be involved?

The Minister invited the Assembly of First Nations (AFN) and the Native Women's Association of Canada (NWAC) to assist in identifying solutions to address matrimonial real property issues on reserves. The AFN and NWAC will each meet with their members and constituents to identify options to address the legislative gap on reserves. Indian and Northern Affairs Canada (INAC) will also consult with provincial governments and other interested parties on this issue.

The Minister appointed Wendy-Grant John as his Ministerial Representative and directed Ms. Grant-John to work with the AFN, NWAC and INAC to build consensus on options identified through consultations and dialogue.

When will the federal government's Nation-Wide Process occur?

The Minister's nation-wide process is scheduled to occur in the following three phases:

- Phase 1 - Planning & Development: June to September 2006
- Phase 2 - Consultations and Dialogue: October to December 2006
- Phase 3 – Consensus-Building: January to March 2007

The Minister's has stated that his nation-wide process will culminate with the tabling of legislation in April or May 2007. If INAC, NWAC and the AFN cannot reach consensus on an option, the Minister has asked his Ministerial Representative to recommend an option.

What is the Assembly of First Nation's involvement in the Nation-Wide Process?

The AFN will be participating in the Minister's process in accordance with the provisions of AFN Resolution No. 32/2006. This resolution calls for "the development of options … in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments."

The Resolution also calls for the establishment of a Matrimonial Real Property Working Group made up of representatives of the AFN Women's Council and a Chiefs and Experts Committee. The Matrimonial Real Property Working Group will provide advice and guidance to the AFN on the development of a facilitation guide and other materials for regional dialogue sessions and on any other matters that may arise during the Minister's nation-wide process.

The AFN will host regional dialogue sessions with First Nations from October to December 2006 to identify options and will seek input from First Nations citizens through its webpage. Options identified through regional dialogue sessions and the webpage will be summarized in a report, which will be presented to the Chiefs in Assembly at a Special Chiefs Assembly to be held in December 2006 or January 2007.

The Chiefs in Assembly will provide direction on options and recommendations made in the final report and this direction will form the basis of the AFN's mandate during the Ministerial representative's consensus-building process and any subsequent dialogue with the federal government on this issue.

What key questions will be addressed during the Nation-Wide Process?

Key questions that will be looked at include:

- What are the legislative and non-legislative options for filling the legislative gap?
- What kinds of rules would be needed to fill the gap?

- Who should be making these rules?
- How will these rules be enforced?
- What else needs to be in place so that the new legislative regime effectively and appropriately addresses matrimonial real property issues on reserves?

What kind of matrimonial real property interests are there on reserve lands and are these the same as matrimonial real property interests located off reserves?

Matrimonial real property interests located on reserve are significantly different than matrimonial real property owed by couples off reserves.

A couple with a family home off-reserve typically own the house and the land upon which it sits. Legal title or fee simple title is the term used to describe legal ***ownership*** of land and any homes or buildings located on that land. In other words, couples that own family homes or land together off-reserve are the ***legal owners*** of such matrimonial real property.

However, the situation is significantly different for couples on reserves. Legal title to reserve lands is held by the federal government, who is the legal owner of such lands.

As the federal government is the legal owner of reserve lands, the greatest interest that couples on reserves can acquire over reserve lands are rights of ***possession.*** There are two principal types of possession in reserve lands that couples can acquire, namely, a Certificate of Possession or a custom allotment.

A Certificate of Possession is a right to lawful possession of reserve lands that is recognized under the *Indian Act.* However, band members can only acquire Certificates of Possession with the consent and authorization of both the band council and the Minister of Indian Affairs. While a Certificate of Possession is a right of possession under the *Indian Act*, it is not a legal interest in land that is recognized at common law.

A custom allotment is another right of possession to reserve lands that band members can acquire. Custom allotments are allotments of land made by bands to their members in accordance with their own customs and traditions. However, custom allotments are not interests in reserve lands that are legally recognized in the *Indian Act* or at common law.

In other words, while matrimonial real property typically consists of both land and the family home, matrimonial real property owned by couples on reserves is usually limited to the family home. Even where a couple hold a Certificate of Possession, the couple does not own the lands described in the certificate. Instead, the couple merely has a legally recognized right to ***possession*** of the land described in the certificate.

It is also worth noting that all members of a band retain a collective underlying interest in any lands held by individual band members under a Certificate of Possession or custom allotment. What is the nature of this collective interest?

Although the federal government is the legal owner of reserve lands, First Nations collectively own what is known as the beneficial interest in reserve lands. In other words, all band members are collectively entitled to the use and benefit of their reserve lands.

The courts have also acknowledged that First Nations have Aboriginal Title and Treaty Rights to their reserve lands. Aboriginal Title and Treaty Rights are another form of collective rights that First Nations hold over their reserve lands, and these interests are constitutionally protected by section 35(1) of the *Constitution Act, 1982.*

Therefore, when searching for solutions to matrimonial real property interests on reserve lands, the collective rights of band members to reserve lands and lands held by Aboriginal Title and Treaty Rights must be balanced with any individual rights that a couple may have to possession of reserve lands by Certificates of Possession or custom allotments.

What does the Assembly of First Nation's expect to accomplish by participating in this process?

The current legislative gap with regard to matrimonial real property on reserves is an issue of concern to the Assembly of First Nations and its member First Nations. This situation affects all First Nations communities and has particularly serious impacts on spouses and children who must leave their communities to find housing.

The AFN is interested in finding a solution to matrimonial real property issues on reserves and related issues such as the chronic housing shortages that exist on most reserves. Due to chronic housing shortages, when First Nations couples separate or divorce, one or both spouses must often leave their community to seek available housing. This contributes to the further breakdown of First Nations families and communities.

To preserve our cultures and strengthen First Nations families, it is essential that solutions enable First Nations children to remain in their communities, live among their extended families and be taught their culture. By finding solutions to matrimonial real property and related issues, the AFN hopes to strengthen First Nations families and communities.

The AFN and First Nations are also interested in preserving First Nations lands for future generations and achieving an appropriate balance between our collective rights in our lands and individual rights of our citizens.

The AFN and First Nations are also interested in achieving the recognition and implementation of First Nations jurisdiction over all matters affecting the health and well- being of our people, including matters relating to matrimonial real property interests on our lands. First Nations have traditional laws, customs and practices to deal with property rights when marriages come to an end. When the *Indian Act* was imposed on our nations, some of these systems were disrupted.

First Nations believe that the solution to matrimonial real property issues on reserves, like so many of the other challenges that face First Nations communities, lies in recognizing and implementing First Nations governance.

We also need to apply First Nations solutions that are based on our traditions and acknowledge the traditionally strong role of First Nations women in our communities.

Unless these issues and interests are addressed, the end result for many First Nations families and communities will be the same regardless of whether or not new laws are put in place.

What will the Assembly of First Nations do to protect our Aboriginal and Treaty rights to our reserve lands?

In searching for solutions to this issue, we must be vigilant in protecting our collective Aboriginal and Treaty rights and there must be an appropriate balance struck between the individual and collective rights of First Nations peoples.

What solutions will the Assembly of First Nations propose to address the gap?

Solutions must be developed through dialogue with First Nations themselves. We do not wish to pre-determine the solutions that will be identified by dialogue with First Nations through regional dialogue sessions.

However, the focus of solutions put forward by the current and prior federal governments has mainly been applying provincial laws to First Nations. This approach is not acceptable to First Nations governments and citizens and was unanimously rejected in Resolution 32/2006.

While the AFN does not want to pre-determine the outcome of dialogue with First Nations, the AFN and member First Nations firmly believes that the solution lies in recognizing and implementing First Nations jurisdiction over property on reserves.

Why do First Nations reject the application of provincial laws as an option to address the legislative gap?

The Supreme Court of Canada has already ruled that provincial laws cannot apply to reserve lands and that applying provincial laws to reserve lands would be unconstitutional.

More specifically, in the *Derrickson* case the Supreme Court of Canada held that insofar as provincial matrimonial property law purports to regulate who may possess land, such laws encroach on the essence of exclusive federal power over the right to possession of lands on an Indian reserve under section 91(24) and must be read down to preserve their constitutional validity.

Rushing to impose provincial laws that may be challenged in court, that don't have community support, and that don't address related issues will not improve the situation for First Nations families and communities. This will only create more uncertainty and impose more hardship on our peoples.

First Nations are interested in meaningful solutions and cannot support unenforceable options that will only result in the imposition of further hardship on our peoples.

Instead, under the *Indian Act* individual Band members can acquire a right to legal possession of land on a reserve. A Certificate of Possession is one such right of possession to reserve lands that is recognized under the *Indian Act.* While a Certificate of Possession is a statutory right of possession under the *Indian Act*, it is not a legal interest in land that is recognized at common law.

How can I provide input?

Please visit our website at www.afn.ca to find out more on how to submit your input. We look forward to hearing your ideas as we work to resolve this important issue.

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Appendix L.

L. First Nations Women Chief's Consensus Statement

Consensus Statement by First Nations Women Chiefs and Councillors
February 14, 2007
Vancouver, British Columbia

First Nations Women Chiefs and Councillors are outraged by Crown government interference in our lives and we're not going to take it anymore. For the first time in modern history, First Nation Women Chiefs and Councillors, from all across Canada, gathered in unity at the Assembly of First Nations National Forum for First Nation Women Chiefs in Vancouver, British Columbia on February 12-14, 2007. First Nations Women Chiefs and Councillors express their overwhelming concern and frustration with the current situation facing First Nations communities, families and children.

This Statement represents the unanimous voice of the Women Chiefs and Councillors present at the Forum to address critical issues affecting our Nations, families and our future to compel change and make progress.

The following statements were adopted by the First Nation Women Chiefs and Councillors:

First Nations Women Chiefs and Councillors honor the spirit and intent of the original relationship between First Nations and the British Crown to live in peaceful co-existence, without interference, and to uphold the unceded Inherent authorities given to us by the Creator.

First Nations in Canada are Nations with pre-existing collective rights, responsibilities, languages, cultures, territories and laws.

We maintain our authority to be the law-makers and caretakers of our Nations, our families and our lands. First Nation holistic laws will continue to guide our decision-making in the face of any and all federal, provincial and territorial legislation. The Crown continues to breach this original compact and interfere with this Inherent jurisdiction, thereby creating and perpetuating poverty conditions amongst our peoples.

Our collective Inherent and Treaty rights must not be diminished or adversely impacted in the development of federal, provincial and territorial law and policy.

First Nations Women Chiefs and Councillors will stand with First Nations governments to advance a comprehensive plan for accountability of all governments, the protection of collective rights and to eradicate poverty and social injustice.

First Nations Women Chiefs and Councillors will ensure that our lands, families and children are cared for; ensure that our rights are respected and upheld; and we will be responsible for the decisions that affect our lives. We will not relinquish our rights at the expense of our lands, families and future.

Negotiations and consultations regarding any federal, provincial or territorial initiatives that impact pre-existing Inherent First Nation jurisdictions and Treaty rights must take place with the leadership of First Nations governments.

Solutions can be achieved locally, regionally, and nationally by working collectively. First Nations Women Chiefs and Councillors call upon the Government of Canada to work together with First Nations governments to co-create a new future for all our people.

The cycle of poverty, violence, lack of access to quality health care and education, and the non-recognition of Inherent First Nations jurisdiction continue to be perpetuated in federal genocide and assimilationist policies and approaches.

First Nation Women Chiefs and Councillors are united to oppose attempts by the federal government to unilaterally impose legislation and policy such as its initiatives currently reflected in the matrimonial real property process, and the repeal of section 67 of the Canadian Human Rights Act. These federal initiatives that diminish or adversely impact upon our unceded Inherent authorities will be rejected.

We will accomplish this through collective efforts that support systemic change.

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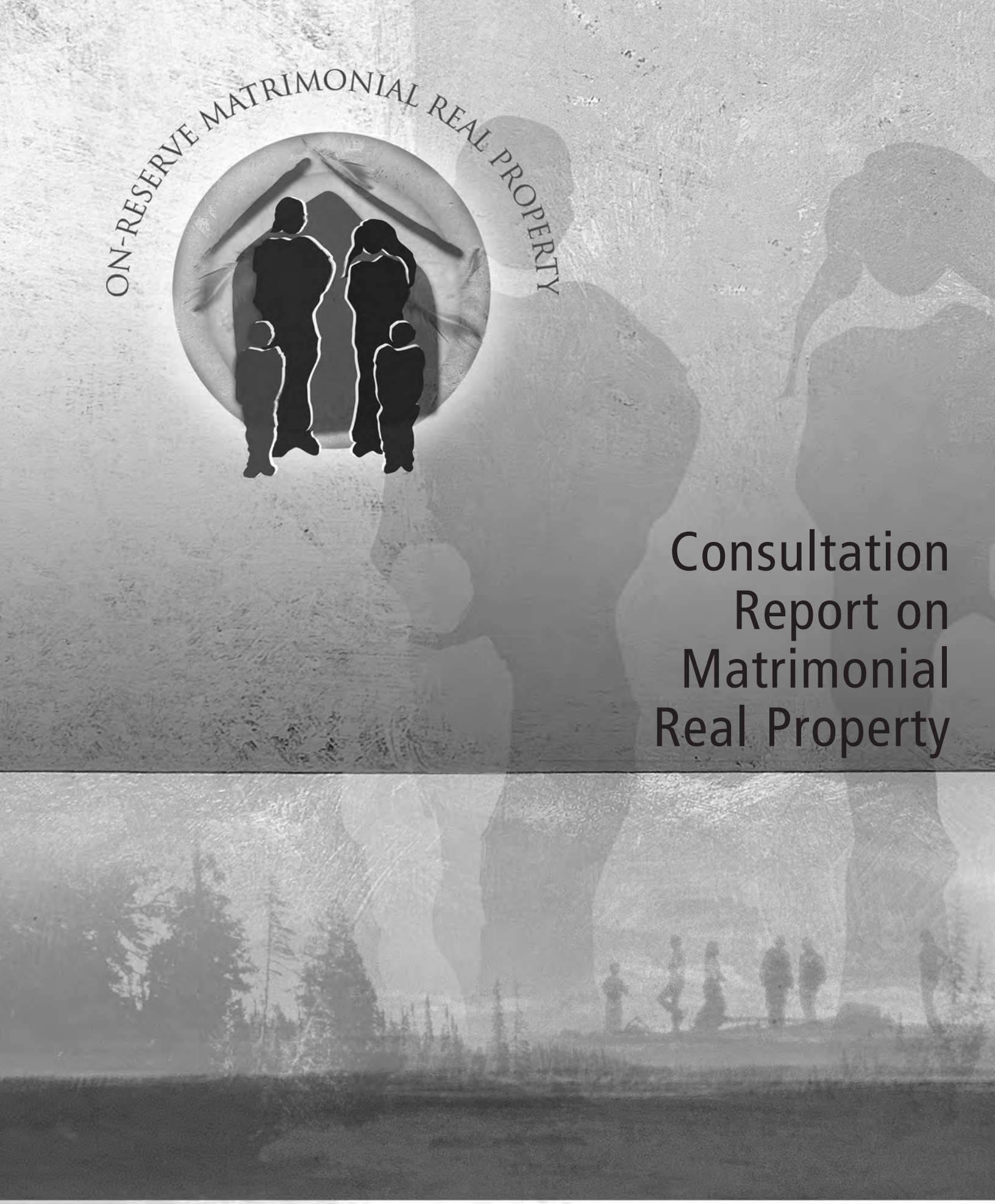

Consultation Report on Matrimonial Real Property

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada
Canada

The purpose of this document is to provide background information for focussed discussion on possible legislative solutions for the provisions of matrimonial real property rights on reserve, in the context of consultation. This document presents an overview of previously identified issues shared through public discussions. This document contains legislative wording that is solely intended to provide an example for the reader of general types of legislative provisions that illustrate how an option may be introduced. This document does not describe every provision related to any particular legislative option. For these reasons, this information document is of a general nature and is solely intended to facilitate the consideration of solutions to the application and enforcement of matrimonial real property rights on reserve. As this document serves to stimulate discussion and ideas, it does not commit the Government of Canada into endorsing/adopting its contents. Also, any future legislative proposal may be subject to amendments by Parliament that could directly impact the future consideration of this issue. Please note that any statements contained in this document should not be treated as legal advice.

The views and opinions expressed in this document represent those of the authors and do not constitute the views of either the Department of Indian Affairs and Northern Development or the Government of Canada.

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CONSULTATION REPORT ON

MATRIMONIAL REAL PROPERTY

INDIAN AND NORTHERN AFFAIRS CANADA

MARCH 7, 2007

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REPORT OVERVIEW

The on-reserve matrimonial real property (MRP) issue has been reviewed by three Parliamentary Committees that have each recommended the federal government address the legislative gap related to matrimonial real property on-reserve by enacting appropriate legislation.

MRP legislation is intended to fill this legislative gap by ensuring that individuals who possess or have an interest in MRP on reserves have access to legal provisions for the equitable division of MRP and protection of related rights and interests in the event of a separation, divorce or death of a spouse.

The MRP consultation process that was announced on June 20, 2006, and launched on September 29, 2006, was intended to inform the legislative solution that will be developed for the MRP issue.

This consultation report comprises five sections that provide background information and highlight what was heard during the INAC departmental consultations held with Aboriginal organizations not represented by the AFN or NWAC on the MRP issue. The AFN and NWAC have prepared their own reports on their consultation and dialogue processes.

Section One provides background information on the legislative gap relating to on-reserve MRP.

Section Two outlines the MRP consultation process that will inform the MRP legislation that is to be developed.

Section Three presents the main findings from consultations held by individual Aboriginal organizations and communities funded by INAC.

Section Four highlights the consultation process with the provinces and territories.

Section Five provides an overview of the consultation process and the main issues raised.

SECTION 1: INTRODUCTION

In the Canadian legal system, matrimonial property is generally defined as property owned by one or both spouses and used for a family purpose. Matrimonial property can be divided into two types of property: (a) "matrimonial real property" (MRP), which includes the land and anything permanently attached to the land, such as the family home; and (b) "matrimonial personal property", which includes property that is movable, such as the family car, furniture and money in a bank account.

Provincial/territorial governments have jurisdiction over property and civil rights under the *Constitution Act*, 1982. In accordance with this legislative power, provinces have enacted laws protecting spousal interests in matrimonial property, including MRP. However, because reserve lands fall under federal jurisdiction and because MRP is not addressed in the *Indian Act*, case law has established that provincial matrimonial property law does not fully apply on reserves.

As a result of this legislative gap, courts have no authority to protect the MRP interests of spouses on reserves. Moreover, courts cannot make an order for temporary or permanent possession of the family home located on a reserve. In relation to on-reserve MRP, courts can only take the value of such land and house into consideration when ordering the distribution of the assets among the spouses. In doing so, courts can use orders in an attempt to strike a balance between the assets of each spouse for equalization purposes.

Many of the legal rights and remedies relating to MRP that are applicable off reserves are not available to individuals living on reserves. Unlike their counterparts living off reserves, spouses living on reserves cannot ask courts to: (a) grant an order for temporary or permanent possession of the family home, even in a situation of domestic violence or when the spouse has custody of the children; (b) order partition and sale of the family home to enforce an order of compensation from one spouse to the other; and (c) preclude a spouse from selling or mortgaging the family home without the consent of the other spouse.

Anecdotal evidence suggests that the issue of on-reserve MRP disproportionately affects Aboriginal women and children, particularly those experiencing family violence. On the breakdown of a marriage or a common-law relationship, many women living on reserves who do not hold a Certificate of Possession (CP) are forced to leave their family home, and in cases where there is no alternative on-reserve housing, their community. Even in cases where a CP is issued to a couple as joint tenants, courts have no authority to grant exclusive interim possession to one of the joint tenants, or to direct the sale of the property. Pursuant to the *Indian Act*, a CP cannot be cancelled or corrected based on family considerations.

SECTION 2: THE CONSULTATION PROCESS

The on-reserve MRP consultation process was launched on September 29, 2006, by the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, with Beverley Jacobs, President of the Native Women's Association of Canada (NWAC), and Phil Fontaine, National Chief of the Assembly of First Nations (AFN). At the same time, Minister Prentice announced the appointment of a Ministerial Representative on this issue,

Wendy Grant-John, to facilitate this consultation process and report back by March 31, 2007, on a recommended legislative solution.

During the consultations, NWAC ensured that the voices of women were heard, the AFN conducted dialogue sessions with representatives of First Nation communities, and Indian and Northern Affairs Canada (INAC) consulted with provincial and territorial governments, as well as Aboriginal organizations not represented by NWAC or the AFN. Ms. Grant-John assisted the parties in preparing their consultation plans and began work leading to the consensus-building phase of this initiative.

The consultations, which began in September 2006 and ended on January 31, 2007, are to form the basis of the collaborative work that will contribute to building consensus on an acceptable legislative solution.

Proposed Options

As part of the consultation process, three options were presented to generate discussion on what a potential legislative solution might entail. Consultation participants were to be asked for their opinions on each of these options and invited to offer other possible solutions for consideration.

Option 1: *Incorporation of provincial and territorial matrimonial real property laws on reserves.*

Under this option, federal legislation would be adopted to make provincial and territorial legal protections on MRP available on reserves. As changes are made to provincial and territorial laws relating to MRP, the same changes would apply on reserves.

Option 2: *Incorporation of provincial and territorial matrimonial real property laws combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property.*

Similar to the first option, federal legislation would be adopted to make provincial and territorial legal protections on MRP available to First Nation individuals living on reserves. This option is different from the first in that it would also enable First Nations to exercise jurisdiction with respect to MRP on reserves.

The laws of the province or territory in which a reserve is located would provide an MRP regime unless and until a First Nation enacts its own MRP rules.

Option 3: *Substantive federal matrimonial real property law combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property.*

Under this option, a substantive federal law would be developed. This law would provide protections for MRP on reserves and enable First Nations to exercise jurisdiction on this issue. Similar to the second option,

the federal law would apply on reserves unless and until individual First Nations enact their own laws on MRP.

INAC Consultation Process and Methodology

Consultations held by Aboriginal organizations

This report provides information from consultations the department held with and provided funding to, interested organizations and communities not represented by either the AFN or NWAC. During 52 sessions, over 680 people were directly consulted by the department, approximately 76% of whom were women. The formal meeting schedule is included in Annex B. There were no applicants from the Yukon, North West Territories, Nunavut, or Saskatchewan.

For their part, the individual Aboriginal organizations arranged their own consultation sessions. As part of their funding requirements, an INAC representative was permitted to attend each session. At the outset of these particular consultation sessions, a consultation package prepared by INAC, which included the three proposed legislative options, was distributed, along with any material the Aboriginal organizations wished to provide.

Provincial and Territorial Government Consultations

On August 22, 2006, Minister Prentice wrote to his colleagues within the provincial and territorial governments requesting assistance in facilitating access to their government officials for the purposes of undertaking the on-reserve MRP consultations. To further assist this process, Michael Wernick, INAC Deputy Minister, subsequently also requested the input of his colleagues within the provinces and territories on the MRP consultation process.

INAC consulted officials from all the provincial and territorial governments, with the exception of Nunavut. Sessions with these officials generally consisted of an overview presentation of the MRP issue by an INAC representative followed by a question and answer segment concerning the MRP consultation process, including questions relating to the potential legislative options contained in INAC's Consultation Document. Often, provincial and territorial government officials shared their preliminary views with the INAC representative on a "without prejudice" basis.

Other consultation methods

Other means of consultation included the INAC web site with an email address for receiving comments. Approximately 40 individuals accessed the web site, responding to, and or seeking information on, the MRP consultation process.

Approximately 15 First Nation organizations contacted the Minister directly to provide input on the consultation process.

This report is the result of information collected and recorded by INAC personnel and from reports submitted by Aboriginal organizations who received funding from INAC to conduct MRP consultation sessions.

SECTION 3: ABORIGINAL ORGANIZATION CONSULTATION FINDINGS

The perspectives of women heard throughout the consultation process contained very consistent messaging. Over 72% of the participants were women, all of whom spoke passionately about the impact of the lack of MRP legislation on their lives. These women specifically spoke about:

- the need for the protection of children to be at the forefront of any solution;
- the fact that women were often forced to leave the reserve after a relationship breakdown or when fleeing domestic violence;
- concerns that women often return to an abusive relationship due to a lack of housing options;
- their disillusionment with the mostly male-dominated system of leadership within First Nation communities; and
- concerns that a First Nation MRP regime may perpetuate this imbalance of power if they are Chief and Council driven and not community driven.

Many common issues were raised by participants during the consultation process undertaken by the Aboriginal organizations not represented by the AFN or NWAC. The following five themes were raised most consistently. Annex B provides further detail, by organization, regarding consultation findings.

1. Concerns about the family home were raised at 64% of consultations

Participants raised concerns that individuals often have no choice but to leave the reserve after a relationship breakdown which is exacerbated by the housing shortage and the lack of housing policies.

In determining who should occupy the family home, children were often cited as needing to be considered first, with older people and those with disabilities also requiring special consideration.

Some participants suggested that if new MRP legislation required a market price for the house, an incentive to divorce may result. This raised alarm that forced sales of family homes may occur, as well as concerns that a spouse could sell a family home without their spouse's knowledge or consent.

Suggestions with respect to the division of the family or matrimonial home included:

- a 50/50 split;
- have the Band buy back the CP to retain Band control with both partners having to vacate; and
- certificates of possession should be passed on through women.

It was further suggested that the CP be tied to specific terms, including a condition that if one spouse (whose name is on the CP) becomes violent against his/her spouse and/or children, the CP will be revoked by the Band and/or granted to the abused parent without question.

Some participants felt that rules should be developed to ensure that each spouse has a means of recuperating their investments in the family or matrimonial home.

In regard to MRP and non-members, suggestions included:

- assigning the CP to the parent caring for the children, regardless of band membership, status or who has title to the CP;
- permitting the custodial parent to occupy the home even if non-status; and
- providing for the family home to be placed in the names of the children with status/band membership and held in trust.

2. Domestic violence was raised at 59% of consultations

Participants reported that, in the event of domestic violence, it is typically the woman who leaves the family home, often returning to an abusive relationship due to a lack of housing options. A decision to leave the relationship generally results in the loss of a home on the reserve and often without anything that may have been acquired during their relationship.

We heard that abusers are rarely permanently or even temporarily removed from the home by the Band or RCMP and that it is the victims of abuse who are forced to flee, typically with their children.

Many suggestions were raised for dealing with cases of domestic violence, including a nearly unanimous belief that an abuser should lose their interest in the home and be forced to leave and that the interests of children should be taken into account above all others.

It was also suggested that legislation should include a provision to revoke a CP from an abusive spouse and temporarily provide one to the abused spouse. Furthermore, participants asserted that abusers should not be allowed on the reserve and that Bands should rule in favour of the victim, regardless of their status. It was further suggested that counselling be provided to both partners in the event of family violence, and that safe houses be available for victims.

3. Membership and Indian Status were raised at 63% of the consultations

Participants asserted that non-members should be entitled to, at least, a temporary interest in the home. There was a feeling that if a non-member had lived with a Band member "for a long time" (e.g. "20 years or more" was cited in one session) that person should be allowed to stay, particularly in the event of the death of a spouse.

On relationship breakdown, there was general consensus that the parent – regardless of status or Band membership – should remain in the home, at least until the children reach the age of majority.

Concerns were raised that non-status individuals may be required to leave the reserve in the case of relationship breakdown. It was suggested a non-status person or non-member's contribution to the community be taken into account when decisions on who will remain in the home are being made.

4. First Nation, federal/provincial jurisdiction was raised at 38% of consultations

First Nation/Band Jurisdiction

Many participants felt that Band Councils make decisions based on who they know and that Chiefs and Councils may not necessarily deal with the issues fairly. Many participants expressed concerns that Chiefs and Councils, often perceived as being a male-dominated power system, have few or no accountability requirements imposed on them. Many felt that Chiefs and Councils should not be allowed to decide which MRP-related regime will apply on reserves and they should not be accorded individual power over MRP-related policies.

Federation/Provincial/Territorial Jurisdiction

Federal/provincial/territorial jurisdictional issues were commonly raised; some participants expressed concern that provincial court orders were not always enforced on reserves, while other participants indicated that it would be important to harmonize federal, provincial, and First Nation laws to ensure an MRP solution would work on reserves. Lastly, the need for an independent appeal process was raised in various discussions.

5. Child welfare protection and child custody was raised at 35% of consultations

It was often argued that children should be the first consideration in any MRP solution. It was stated that MRP issues have resulted in children suffering by being removed from their home communities and moved to urban areas.

Suggestions were framed around protecting children (and their mothers) first and foremost, and recognizing the right of a child to be raised in their own culture.

Key suggestions included:

- whomever has custody of the children should stay in the house;
- where children are involved, there has to be compensation for both parties whether they have status or not; and
- any law must ensure that a parent with a child or children is allowed to remain in the home, regardless of who has their name on the CP.

The Proposed Options

In many of the consultation sessions, participants tended to focus on addressing the issues outlined above rather than discussing the proposed options. Where the options were specifically addressed, the following summarizes what was heard.

Option 1 - Incorporation of provincial and territorial matrimonial real property laws on reserves

Option 1 was largely rejected as most groups felt that existing provincial laws are inadequate. It was stated that the application of provincial laws on reserves works against the self-determination of a given community and does not acknowledge traditional laws and values nor recognize the assertion of First Nation governance.

Specific concerns regarding provincial legislation were raised in relation to the following issues:

- in Newfoundland and Labrador, common-law couples must prove their financial contribution to a relationship to gain access to any of the matrimonial property, whereas married couples are better protected;
- there is no alternative dispute resolution mechanism in place to settle a separation out of court;
- many participants thought that there should only be one law for all Bands and that the application of provincial/territorial MRP laws would create different regimes across First Nation communities; and
- this option does not provide a legislative mechanism for individual First Nations to develop their own MRP laws.

Option 2 - Incorporation of provincial and territorial matrimonial real property laws combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property

While it was generally agreed by participants that Chiefs and Councils are more likely to support this option over Option 1, the same concerns regarding the application of provincial laws on reserves apply. In addition:

- some participants stated that Band Councils should not be allowed to make laws on MRP because they did not have faith that Band Councils would act in the best interests of the community;
- an independent appeal body was proposed to alleviate concerns regarding Chiefs and Councils having authority over MRP issues; and
- there were many who thought that each Band's laws should appropriately reflect their unique needs and values.

Option 3 - Substantive federal matrimonial real property law combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property

When participants indicated a preferred solution, it was almost always Option 3, with the caveat that a means for First Nations to create their own MRP laws be included. The following points were also heard:

- as with Option 2, it was strongly felt that federal laws, in general, do not recognize traditional laws and values and dividing assets is contrary to the more traditional approach of sharing assets;

- some participants felt that the federal government alone has a fiduciary or nation-to-nation relationship with First Nations; and
- the *Indian Act* was raised at several consultations with suggestions that it be completely replaced; and
- that Aboriginal people draft legislation from a grassroots level.

Alternative Solutions

At the consultation sessions, other legislative suggestions included: recognition of First Nations inherent jurisdiction to enact their own laws governing MRP; a hybrid of federal and provincial/territorial laws with First Nation law-making abilities; and a hybrid of federal and provincial or territorial laws without First Nation law-making abilities.

Some non-legislative solutions were also suggested as alternatives to the three proposed legislative options. Fundamental principles underlying most of these alternative suggestions were the best interest of the child and a First Nations culturally-appropriate framework.

The main non-legislative solution discussed was some form of independent and accountable tribunal/body determining MRP issues that would create checks and balances for Chiefs and Councils, and to act as an appeal process for their decisions to ensure protection of rights and equality of all parties involved.

Other considerations included:

- the creation of independent First Nation circuit courts or Elders Circles;
- implementing alternative dispute resolution mechanisms;
- addressing the gap in the on- and off-reserve housing market values to compensate couples who vacate the family home for their share in the equity of the home on the basis of an independent appraisal;
- increased representation of women in decision-making roles when addressing MRP issues;
- the creation by Chiefs of a forum that ensures the equal representation of women and men in the development of community-based solutions to MRP;
- investments to reduce family breakdown and support systems for women and children including housing and shelters;
- increased education and awareness of MRP issues on reserves;
- amendment of the CP system to ensure equity; and
- a moratorium to allow time for more consultations.

SECTION 4: CONSULTATIONS WITH PROVINCES AND TERRITORIES

All provinces and territories were invited to participate in the consultation process. In addition, all provincial and territorial Ministers responsible for Aboriginal Affairs were asked for their cooperation in arranging and coordinating their government's input into the MRP consultation process. Comments were received on a "without prejudice" basis.

Although many common issues were raised by provincial/territorial representatives during the consultation process, including that the consultation timelines were too short and that they needed more time to prepare for implementation, there were four main areas of concern, namely:

1. Division of Powers

The challenge created regarding this issue relates to the provinces having jurisdiction over family and property law and the Government of Canada having jurisdiction over reserve lands.

Specific concerns revolved around:

- enforcement, including which court(s) will have jurisdiction over on-reserve MRP issues; and
- the different provincial/territorial regimes, especially the harmonization of laws and regulations within their own jurisdiction.

2. Funding Pressures

Some jurisdictions expressed the view that MRP legislation may result in an increased demand on existing provincial programs and services and suggested the Government of Canada was offloading a federal responsibility to the provinces and territories.

Specific funding issues that were identified as needing to be addressed related to implementing and administering legislation that implicates provincial/territorial jurisdiction, particularly where the demand for legal or social services is increased as a result of the legislation.

3. Self-Government Agreements

Provincial and territorial government representatives wanted reassurance that any MRP solution would not affect any existing agreements or negotiations and requested further information on the application of a legislative MRP solution to self-government or land agreements as soon as possible.

4. Further Consultations

Almost all jurisdictions indicated that they want to be consulted further, once a legislative solution is identified.

The Proposed Options

Of the seven provincial/territorial representatives that stated an opinion on a preferred option, four preferred Option 3.

Each of Options 1 and 2 were preferred by a jurisdiction and one jurisdiction stated that all three options presented were acceptable as a means for the Minister to provide protection on reserves.

Five provincial/territorial governments advised that they would be better able to indicate a preference if the proposed legislative model were provided to them.

There was consistent support for First Nations assuming jurisdiction.

SECTION 5: CONCLUSIONS

The consultation process provided the opportunity for First Nations and other relevant stakeholders to engage in efforts to determine a solution to the MRP legislative gap that affects so many people in First Nation communities.

While options for legislation were proposed for consideration, most participants were more concerned about addressing MRP issues rather than specific mechanisms to resolve these issues.

When participants did choose a specific option, Option 3 was most favoured of the options proposed.

Overall, suggestions by participants during the consultation sessions include:

- incorporate a First Nation mechanism to create and implement MRP legislation;
- create a balance between the authority of Chiefs and Councils over MRP issues and a First Nation community-driven approach to the decision-making process;
- maintain federal involvement in MRP issues as the Government of Canada has jurisdiction on reserves pursuant to the *Indian Act* and also has fiduciary obligations toward First Nations;
- ensure that First Nation organizations are actively involved in the policy-making process;
- incorporate First Nation traditional and cultural values into any legislative solution, i.e. it was suggested that any new MRP legislation respect traditional marriages;
- develop a legislative solution to immediately address the legislative gap for this complex issue and build on this by enabling a future review of the legislation; and
- ensure that the best interest of the child is placed first and foremost in the development of an MRP legislative option.

While it was generally agreed that the issue of MRP needed to be addressed, criticisms were expressed regarding the consultation process, particularly with respect to the timeframe in which they occurred. The timelines were often viewed as too short, not allowing time to review and properly understand the complexities of this issue. Some participants felt that INAC should have gone directly to individual community members and that information should have been more readily available to everyone and not just disseminated via the internet.

ANNEX A: CONSULTATIONS WITH ABORIGINAL ORGANIZATIONS AND COMMUNITIES

The information presented above in Section 3 is an aggregation of reports from INAC representatives (who attended the consultation sessions) in addition to reports submitted by each Aboriginal organization and community funded to undertake MRP consultations. This section provides a summary of each Aboriginal organization's consultation report and highlights issues that were emphasized or that differed significantly from the findings already presented in Section 3.

Assembly of Manitoba Chiefs (AMC)

The AMC held one session with approximately 43 participants, including representatives from 27 Manitoba First Nation communities, four tribal council representatives and five members of the AMC First Nations Women's Council.

The session was framed as a preliminary educational/information session. Participants felt that consultation with First Nations directly by the federal government must occur based on the principles of free, prior and informed consent, and reconciliation.

According to the AMC, essential elements for an MRP solution should include, but not be limited to:

- recognition and implementation of First Nations' authority over family law;
- protection of the First Nations' land base and interests, now and into the future;
- support systems for women, men, children and families;
- building on, and promotion, of First Nation human rights, including an appropriate balance between individual and collective rights; and
- sustainable outcomes for First Nation communities and governments.

Other suggestions included:

- the federal government should recognize authority over citizenship and provide education/information sessions on Bill C-31 in the interim;
- future discussions between the federal government and First Nation leaders should include a combined Bill C-31 and MRP scenario;
- a First Nations principle for "best interests" of children should be developed;
- interventions to keep families together; and
- more conceptualizing of "human rights" needed before any MRP solution is implemented.

Congress of Aboriginal Peoples (draft CAP Report)

CAP held four dialogue and consultation sessions with a total of 188 participants. Additional sessions were cancelled due to logistical challenges. These, however, were offset with the addition of a web-mounted survey.

Specific concerns included:

- *Indian Act* provisions that discriminate against Aboriginal women and their children and future generations of Aboriginal people;
- no protections for same-sex couples;
- a lack of family supports and institutions designed to sustain First Nation families both on and off reserves;
- impacts of socio-economic issues contributing to increased family violence, marital breakdown and other issues; and,
- enforcement of MRP legislation.

Proposed solutions included:

- gender equity amendments to the *Indian Act*;
- increased social programming to enhance well-being on and off reserves, e.g. housing, shelters, cultural awareness; and
- emphasis on education, advocacy, counselling and awareness of MRP issues.

There was no decisive reaction to the three options, however participants were less favourable to the application of provincial laws and concerns were raised that the application of federal laws would be seen as detrimental to self-government. It was felt that funding to address the issues and proposed solutions should accompany any option.

Eel Ground First Nation

One consultation session occurred in Miramichi with approximately 15 participants. In addition, 100 telephone surveys were conducted within the communities of Eel Ground, Burnt Church and Metapeniage; and six tape-recorded interviews with Elders regarding customary laws, marriage and property was broadcast on the Aboriginal people's Television Network (APTN) to reach a broader audience.

Specific recommendations to address indirect issues included:

- increased cultural awareness;
- increased focus on family and culture;
- laws and policies need to respect traditional ways and not divide people into categories;

- culturally appropriate education systems; and
- taking control over policies and legislation that impact on daily lives, in relation to all matters.

The Eel Ground First Nation's report indicated that many women were not aware of the issues with respect to MRP and did not fully understand what the government was trying to achieve through the proposed options. Opinion was expressed that women and children should be protected as a priority, that enforcement, implementation and redress are critical issues; and, the development, implementation, and enforcement of any future policies must be carried out in full partnership with Mi'kmaq governments and their communities.

Federation of Newfoundland Indians (FNI)

The FNI held nine consultation sessions with approximately 85 people in total – 76% women.

The FNI report indicates that many participants did not consider the consultation sessions to be true consultations due to the short time frame in which they were carried out. Participants favoured a consistent, flexible approach that permits First Nation communities or Bands to establish a common framework that suits their unique culture and community needs while providing protection for women and children involved in marital breakdown.

Participants identified a need for greater education, awareness and intervention capacity to support women and children in understanding and acting on their rights in all stages of marriage and marital breakdown.

Other concerns included:

- MRP consultation efforts required more in-depth consideration;
- any *Indian Act* amendments are closely intertwined with gaps on other topics, such as Band governance, rights protection and enforcement; and
- the fact that many women faced persecution and retribution in coming forward with their stories and that this was not addressed.

Indigenous Bar Association (IBA)

The IBA consultation session was held as part of their 18th Annual Fall Conference. As such, their report is limited to highlighting a few key challenges, key successes and key messages.

Information gleaned from the INAC representative report indicates that 15 participants attended and that 66% were women.

With regard to the options, participants felt that there needs to be a hybrid of Options 2 and 3 since both federal and provincial governments have overlapping, but not full jurisdiction. In addition, it was felt that an immediate recognition of powers should be given to First Nations to develop their own MRP laws.

More general suggestions included:

- funding should be available to First Nations to make their own codes/laws if either Options 2 or 3 are chosen;
- the options proposed lack a traditional component;
- participants want to see draft legislation before it is introduced;
- the consultation timeframe is too short; and
- it is questionable whether the AFN or NWAC truly represent the First Nation population.

Les femmes autochtones du Québec (FAQ)

The FAQ held 5 one-day consultation sessions involving 55 participants in total – 93% of whom were women.

Given the small number of participants, the views expressed by participants were not considered by the FAQ to be representative of all First Nations in Quebec.

The main recommendations were:

- all parties involved should work together to correctly and adequately inform First Nations to allow them to make informed choices about MRP;
- the legal protection of women during separation or divorce is desirable, but not if it is imposed without meaningful consultation.

The FAQ rejected the consultation process because it considered:

- the timelines short and inflexible;
- inadequate financial resources provided, and a large territory to cover, forced the FAQ to make choices limiting the number of First Nations consulted;
- that insufficient information was provided to make an informed choice between the three options;

The FAQ recommended more time to discuss and consider:

- implications of the *Indian Act*, the creation of new laws or modification of existing laws;
- the interplay between First Nation law-making powers and the application of provincial law on reserves; and
- alternative options put forward at other consultation sessions, e.g. for AFN Chiefs and not others.

National Aboriginal Circle Against Family Violence (NACAFV)

The NACAFV held seven MRP sessions across the country with a total of 42 participants, all of whom were First Nations women (shelter staff and clients).

The issue of domestic violence was raised often, particularly as to how it relates to women, in the context of family violence, losing their homes; many women felt they have few rights as it pertains to their homes and having to move off the reserve for security reasons. Considerable concern was raised about shelter clients returning to their communities and not having anywhere to go due to housing shortages. There was significant concern about the power of Chiefs and Councils to make decisions and a common feeling that they may not care about MRP issues. Many participants felt that it was important to incorporate customary or traditional decision-making approaches to determine possession of the matrimonial home, and most believed gender equality needed to be addressed in any MRP solution.

Limited discussion took place around the proposed options. However, in one consultation session where discussion was more lengthy, the options were specifically addressed with Option 1 not being supported because it was felt that it meant relinquishing jurisdiction to a province, Option 2 not being supported as it was felt that provincial and federal cooperation was not likely, and Option 3 receiving some support as it includes a First Nation mechanism that may assist First Nations in developing their own rules. It was noted that were an Option 3-type solution to be used, minimum standards should be required. It was commonly felt that women's involvement in the development of MRP codes or laws would need to be incorporated into any process that is contemplated for MRP legislation.

National Association of Friendship Centres (NAFC)

The NAFC held one consultation session with 23 participants, 87% of whom were women.

The main recommendation was for legislation to include recognition of First Nations inherent jurisdiction over MRP with clearly defined minimum standards, e.g. Charter application, principles of fairness and equity, inalienability of First Nations land, priority on dependants, and incorporation of customs and traditions.

In addition, it was viewed that new MRP regimes must be linked to implementation and enforcement plans; and that formal relationships between Friendship Centres, local First Nations communities and other government agencies be addressed, as Friendship Centres are often relied on to provide unfunded services to sustain women and children grappling with the affects of MRP.

Native Council of Nova Scotia (NCNS)

The NCNS conducted seven consultation sessions with approximately 39 participants, 56% of whom were women.

The NCNS recommended Option 3 as the best of the three options presented, provided that MRP legislation is in line with human rights and constitutional law, and is enforceable.

Some participants believed that:

- both status and non-status partners should be compensated, especially if children are involved;
- there be an independent review panel and/or an Elders' Circle to make decisions on an individual basis; and
- children should be a priority.

Native Council of Prince Edward Island (NCPEI)

NCPEI held three consultation sessions involving a total of 28 participants, 60% of whom were women. In addition, a wrap-up session was held with 27 participants.

The main conclusions were:

- that Aboriginals should draft their own MRP laws;
- focus should be on individuals and not Chiefs and Councils; and
- the need to consider children and future generations.

Most of the participants did not agree with the proposed options.

Additional discussions occurred around:

- eliminating or revising the *Indian Act*;
- limiting the scope of federal or provincial legislation with respect to MRP;
- framing the options around an Aboriginal perspective;
- sovereignty being considered as a fourth option; and
- the incorporation of traditional practices including mediation through justice circles.

New Brunswick Aboriginal Peoples Council (NBAPC)

The NBAPC held six consultation sessions with approximately 22 participants, 50% of whom were women.

Three main recommendations were noted:

- the *Indian Act* be replaced rather than "tinkered" with;
- MRP related legislation should be adjudicated by federal courts, provincial courts and an independent First Nations circuit court; and
- on- and off-reserve legal systems should work together to resolve MRP-related issues based on mutual jurisdiction.

Other recommendations included:

- amending the CP system to include more than one spouse;
- recognition of traditional marriages;
- application of a consistent MRP regime on reserves;
- Chiefs and Councils should not be accorded individual power over MRP-related policies; and
- mechanisms to resolve Bill C-31 issues should be put in place.

Nishnawbe Aski Nation (NAN)

NAN held one consultation session that included three focus groups over three days with approximately 30 participants, all of whom were women.

All three options were rejected on the basis that provincial and federal laws do not recognize traditional laws, and that dividing assets does not accord with the traditional approach of sharing assets.

Recommendations included:

- a five-year moratorium on MRP consultations and funding for communication with communities; and
- MRP customs and practices be revived by each community, including restorative justice and "the circle approach".

Other concerns were expressed over the safety and well-being of women and children, the possible infringement of collective rights, and the quality and availability of housing.

Treaty 6, 7 and 8 (Gathering hosted by Advisory Council of Treaty #6)

This "Information Sharing Session" included 52 participants, 69% of whom were women.

The main recommendation was to recognize First Nations' inherent jurisdiction to enact MRP laws.

Other recommendations included: a review of Bill C-31 issues, continued involvement of all members in land-use decisions, and a restructuring of the consultation process. Some participants also felt that the federal government's fiduciary trust responsibility must be preserved to safeguard Treaty Indians' political, social and economic interests.

Wet'suwet'en First Nation

One consultation session was held by the Wet'suwet'en First Nation, involving three participants – all women.

All three options were rejected because it was felt that they do not fit the needs of the Wet'suwet'en women or respect the communities' traditional values.

Participants recommended settling compensation issues related to Bill C-31 prior to moving forward with any MRP legislation. The opinion was expressed that the negative impacts of MRP are due to the effects of the *Indian Act* and values which operate contrary to Aboriginal societal beliefs.

ANNEX B: CHRONOLOGY OF INAC MRP CONSULTATIONS BY PROVINCE/TERRITORY

NATIONAL CONSULTATIONS

British Columbia	Date: December 12, 2006 Event: National Consultation Lead organization: Congress of Aboriginal Peoples (CAP) Place : Vancouver, BC
	Date: November 18, 2006 (2 sessions) Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Bella Cola, BC
Alberta	Date: November 14-15, 2006 (2 sessions) Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Morley, AB
Saskatchewan	Date: October 19, 2006 Event: Indigenous Bar Association Annual General Meeting Lead organization: Indigenous Bar Association (IBA) Place: Saskatoon, SK – Annual General Meeting
	Date: December 13, 2006 Event: National Consultation Lead organization: Congress of Aboriginal Peoples (CAP) Place: Saskatoon, SK
	Date: November 11-13, 2006 (2 sessions) Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Fort Qu'Appelle, SK
Ontario	Date: December 5, 2006 Event: National Consultation Lead organization: National Association of Friendship Centres (NAFC) Place: Ottawa, ON
	Date: November 3-4, 2006 Event: National Consultation Lead organization: Congress of Aboriginal Peopless (CAP) Place: Ottawa, ON – Annual General Meeting

	Date: January 2007 Event: National Consultation Lead organization: Congress of Aboriginal Peopless (CAP) Place: Ottawa, ON – FN Caucus
	Date: November 27, 2006 Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place : Sault Ste Marie, ON
	Date: December 4, 2006 Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Akwesasne, ON
Quebec	Date: December 13, 2006 Event: Regional Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Kitigan-Zibi, QC
Nova Scotia	Date: December 5-7, 2006 (2 sessions) Event: National Consultation Lead organization: National Aboriginal Circle Against Family Violence (NACAFV) Place: Halifax, NS

REGIONAL CONSULTATIONS BY PROVINCE/TERRITORY

British Columbia

Date: January 11, 2007
Event: Consultation session with Wet'suwet'en
Lead organization: Wet'suwet'en
Place: Moricetown, BC

Date: January 12, 2007
Event: Consultation session with Wet'suwet'en
Lead organization: Wet'suwet'en
Place: Houston, BC

Alberta

Date: December 6, 2006
Event: Regional Consultation
Lead organization: Treaty 6, 7 & 8
Place: Edmonton, AB

Manitoba

Date: November 22, 2007
Event: Regional Consultation
Lead organization: Assembly of Manitoba Chiefs (AMC)
Place: Winnipeg, MB

Ontario

Date: November 17-19, 2006
Event: Nishnabe-Aski Nation Annual General Assembly
Lead organization: Nishnabe-Aski Nation (NAN)
Place: Thunder Bay, ON

Quebec

Date: November 28, 2006
Event: Regional Consultation
Lead organization: Femmes Autochtones du Québec (FAQ)
Place: Sept-Iles, QC

Date: November 30, 2006
Event: Regional Consultation
Lead organization: Femmes Autochtones du Québec (FAQ)
Place: La Tuque, QC

Date: December 2, 2006
Event: Regional Consultation
Lead organization: Femmes Autochtones du Québec (FAQ)
Place: Wendake, QC

Date: December 9, 2006
Event: Regional Consultation
Lead organization: Femmes Autochtones du Québec (FAQ)
Place: Val D'Or, QC

New Brunswick

Date: November 18, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: Dalhousie, NB

Date: November 19, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: Beresford, NB

Date: November 22, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: Saint John, NB

Date: November 26, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: St-Basile, NB

Date: November 29, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: Fredericton, NB

Date: November 29, 2006
Event: Regional Consultation
Lead organization: New Brunswick Aboriginal Peoples' Council (NBAPC)
Place: Moncton, NB

Prince Edward Island

Date: December 7, 2006
Event: Regional Consultation
Lead organization: Native Council of Prince Edward Island (NCPEI)
Place: Mt. Stewart, PEI

Date: December 11, 2006
Event: Regional Consultation
Lead organization: Native Council of Prince Edward Island (NCPEI)
Place: Tyne Valley, PEI

Date: December 14, 2006 (2 sessions)
Event: Regional Consultation
Lead organization: Native Council of Prince Edward Island (NCPEI)
Place: Charlottetown, PEI

Nova Scotia

Date: December 4, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Sydney, NS

Date: December 6, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Truro, NS

Date: December 8, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Yarmouth, NS

Date: December 9, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Kentville, NS

Date: December 11, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Milton/Liverpool, NS

Date: December 13, 2006
Event: Regional Consultation
Lead organization: Native Council of Nova Scotia (NCNS)
Place: Milton/Liverpool, NS

Date: January 9, 2007
Event: Eel Ground First Nation Consultation
Lead organization: Eel Ground First Nation
Place: Amherst, NS

Newfoundland & Labrador

Date: November 26, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: St. George's, NL

Date: November 27, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Corner Brook, NL

Date: November 27, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Stephenville (Indian Head), NL

Date: December 3, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Benoit's Cove, NL

Date: December 3, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Flat Bay, NL

Date: December 4, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Grand Falls/Windsor, NL

Date: December 5, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Gander Bay, NL

Date: December 6, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Port au Port, NL

Date: December 7, 2006
Event: Regional Consultation
Lead organization: Federation of Newfoundland Indians (FNI)
Place: Appleton (Glenwood), NL

Yukon, North West Territories and Nunavut

No INAC sessions

ANNEX C: SUMMARY STATISTICS

(Note that these statistics exclude consultations held by NWAC and the AFN; and the number of participants **usually excludes** the INAC representative(s) and facilitator)

INAC MRP Consultation Sessions Summary Statistics (based on available information)				
	Location	# of Participants	# of Female Participants	% of Female Participants
	NATIONAL SESSIONS			
	6 sessions	**226**	**34**	**15%**
Congress of Aboriginal Peoples	Vancouver	4	4	100%
Congress of Aboriginal Peoples	Ottawa (AGM)	162	Unknown	
Congress of Aboriginal Peoples	Saskatoon	6	Unknown	
Congress of Aboriginal Peoples	Ottawa(caucus)	16	Unknown	
Indegenous Bar Associations	Saskatoon	15	10	67%
National Association of Friendship Centres	Ottawa	23	20	87%
	REGIONAL SESSIONS			
British Columbia	**4 regional sessions**	**19**	**17**	**89%**
Wet'suwet'en	Smithers	3	3	100%
Wet'suwet'en	Moricetown	9	7	78%
National Aboriginal Circle Against Family Violence	Nuxalt Nation Transition House	1	1	100%
National Aboriginal Circle Against Family Violence	Nuxalt Nation Transition House, Bella Coola	6	6	100%
Alberta	**3 regional sessions**	**63**	**49**	**78%**
National Aboriginal Circle Against Family Violence	Morley	6	6	100%
National Aboriginal Circle Against Family Violence	Morley	5	5	100%
Treaty 6, 7, and 8 (Women's Advisory council)	Edmonton	52	38	73%
Saskatchewan	**2 regional sessions**	**7**	**7**	**100%**
National Aboriginal Circle Against Family Violence	Fort Qu'Appelle	1	1	100%
National Aboriginal Circle Against Family Violence	Fort Qu'Appelle	6	6	100%
Manitoba	**1 regional session**	**43**	**Unknown**	
Assembly of Manitoba Chiefs		43	Unknown	
Ontario	**3 regional sessions**	**41**	**41**	**100%**
Nishnawbe Aski Nation	Thunder Bay	30	30	100%
National Aboriginal Circle Against Family Violence	Sault Ste. Marie	6	6	100%
National Aboriginal Circle Against Family Violence	Akwesasne	5	5	100%
Quebec	**5 regional sessions**	**52**	**49**	**94%**
Femmes Autochtones du Québec	Wendake	20	19	95%
Femmes Autochtones du Québec	La Tuque	2	2	100%
Femmes Autochtones du Québec	Val D'Or	6	6	100%
Femmes Autochtones du Québec	Sept Iles	18	16	89%
National Aboriginal Circle Against Family Violence	Kitigan-Zibi	6	6	100%
Atlantic	**28 regional sessions**	**231**	**126**	**55%**
Native Council of Nova Scotia	Sydney	5	2	40%
Native Council of Nova Scotia	Yarmouth	2	2	100%
Native Council of Nova Scotia	Truro	2	1	50%
Native Council of Nova Scotia	Kentville	2	1	50%
Native Council of Nova Scotia	Milton	8	6	75%
Native Council of Nova Scotia	Sheet Harbour	20	10	50%
National Aboriginal Circle Against Family Violence	Millbrook	1	1	100%
National Aboriginal Circle Against Family Violence	Millbrook	5	5	100%
Eel Ground	Amherst	15	1	7%
Federation of Newfoundland Indians	Grand Falls	4	4	100%
Federation of Newfoundland Indians	Port au Port	14	4	29%
Federation of Newfoundland Indians	St. Geoge's	3	3	100%
Federation of Newfoundland Indians	Stephenville	10	10	100%
Federation of Newfoundland Indians	Flat Bay	11	11	100%
Federation of Newfoundland Indians	Gander Bay	29	19	66%
Federation of Newfoundland Indians	Appleton	3	3	100%
Federation of Newfoundland Indians	Benoits' Cove	4	4	100%
Federation of Newfoundland Indians	College of the North Atlantic	11	10	91%
New Brunswick Aboriginal People's Council	Dalhousie	5	Unknown	
New Brunswick Aboriginal People's Council	Beresford	5	2	40%
New Brunswick Aboriginal People's Council	Saint John	3	1	33%
New Brunswick Aboriginal People's Council	Fredericton	7	5	71%
New Brunswick Aboriginal People's Council	Saint Basile	1	Unknown	
New Brunswick Aboriginal People's Council	Moncton	1	1	100%
Native Council of PEI	Tyne Valley	10	6	60%
Native Council of PEI	Mount Stewart	11	6	55%
Native Council of PEI	Charlottetown (Elder's Circle)	12	8	67%
Native Council of PEI	Charlottetown (wrap-up session)	27	Unknown	
The North	–			
TOTAL (National and Regional)	**52 sessions**	**682**	**323**	**77%** [1]
	OTHER CONSULTATION METHODS			
E-mails	**Approximately 55**			
Letter	**Approximately 15 submissions**			
Phone calls	**Approximately 15 calls**			
Provinces/territories	**All provinces/territories except Quebec have provided input**			
Government of Canada	**1 inter-departmental meeting has occurred**			

[1] percentage has been adjusted for missing gender information

Reclaiming Our Way of Being

Matrimonial Real Property Solutions
Position Paper

January 2007

Acknowledgements

President Beverley Jacobs, on behalf of the Board of Directors and staff of the Native Women's Association of Canada wishes to extend a heartfelt thanks to all the youth, women, and men who shared their stories and who assisted in finding solutions during the Matrimonial Real Property Solutions initiative. She expresses appreciation for their strength, knowledge, and passion, and appreciates their knowledge of the responsibilities towards the healthiness and well-being of their communities. She also appreciates the role that everyone has played in ensuring that we are all planning and thinking about our future generations.

NWAC acknowledges that many individuals faced personal risk because of their decision to participate, yet they chose to do so in order to assist in the identification of solutions that will benefit all Aboriginal people.

President Jacobs acknowledges the advice of the Elders who have participated in the planning and implementation of this consultation process. She thanks the Elders who came together and provided guidance at the various sessions which formed this consultation process.

President Jacobs acknowledges the support of the Aboriginal community. She extends appreciation to the individuals who provided advice through their participation in focus groups, writing surveys, calling in, as well as participating on steering committees, advisory groups, and board of directors. She also appreciates the hard work and commitment of NWAC's dedicated staff and consultants who ensured that the words and spirit of the participants was included in this report.

Table of Contents

Executive Summary

The issue of Matrimonial Real Property (MRP) has been awaiting resolution for over 20 years. The Native Women's Association of Canada was pleased to participate in this consultation and consensus building process in partnership with the Assembly of First Nations and Indian and Northern Affairs Canada (INAC) that was aimed at identifying solutions for MRP issues.

The Native Women's Association of Canada (NWAC) used a variety of means to gather information and heard the ideas of Aboriginal women about the solutions they believed would be most appropriate and useful in resolving MRP. The information gathered from Aboriginal people who participated in these sessions is the basis for this position paper.

The vision, principles and solutions are grounded in the voices of the participants in the MRP Solutions initiative who shared their thoughts and ideas for solutions with NWAC. Each solution is associated with short, medium, and long-term recommendations.

Vision:
Our vision for this process is "*Reclaiming our way of being*": a balance of healthy individuals, families, communities, and nations that are grounded in our traditional teachings and knowledge.

Principles
Our principles specifically relate to:

- Women and their role in this process and in the community;
- Aboriginal children and their well-being;
- Elders, and their importance as carriers of traditional knowledge;
- Governance and its role in healthy communities;
- Remoteness, and the additional challenges faced by semi-remote, remote and isolated communities;
- The responsibility of the federal government for past discriminatory practices.

Solutions
The solutions generated through our consultation process have been grouped into six broad themes:

1. Intergenerational impacts of colonization
2. Violence
3. Justice
4. Accessibility of supports
5. Communication and education
6. Legislative change

The next step is to achieve consensus with our partners on a way forward which will enable the implementation of solutions that will result in benefits for all Aboriginal individuals, families, communities, and nations.

Introduction

NWAC Mission

The Native Women's Association of Canada is founded on the collective goal to enhance, promote, and foster the social, economic, cultural, and political well-being of Aboriginal women in First Nations and Canadian society. NWAC helps to empower women by being involved in developing and changing legislation which affects them, and by involving them in the development and delivery of programs promoting equality for Aboriginal women.

Matrimonial Real Property (MRP)

The *Indian Act* does not contain provisions governing on reserve "matrimonial real property" which is a term that includes a couple's home or land that they live on, or benefit from, during their marriage or marital relationship. In 1986, the Supreme Court of Canada ruled that provincial and territorial laws on matrimonial real property do not apply to reserve land. These decisions created a gap in the law which has had serious consequences, especially for Aboriginal women.

Couples who agree on how to deal with their matrimonial real property do not have a comprehensive legal framework within which they can give effect to their intentions. Where couples do not agree, there is no mechanism for resolving their disputes. Without legal protection, women experiencing the breakdown of their marital relationship, experiencing violence at home, or dealing with the death of their partner often lose their homes on reserve. This makes it difficult for them to maintain regular contact with their extended family and friends, and results in the loss of their contributions to the well-being of their community, now and in the future.

MRP Solutions Initiative

Activities

NWAC has long recognized that the lack of matrimonial real property law has negative consequences for Aboriginal women and children. NWAC has been advocating since the 1990's for a solution to rectify this problem. NWAC welcomed the opportunity to work in collaboration with the Assembly of First Nations (AFN) and Indian and Northern Affairs Canada (INAC) to find solutions to the inequitable access to matrimonial property rights by Aboriginal women and men.

The goals established for NWAC's participation in this process included:

- Ensuring that the unique needs and interests of Aboriginal women are reflected throughout the entire consultation process;
- Working towards a respectful balance between the collective and individual human rights of Aboriginal women and the communities they belong to;
- Seeking the best possible solutions to facilitate meaningful access to MRP protections for women and children living on reserve.

Throughout this process, NWAC has been committed to ensuring that solutions come from the individuals who have been affected by the current legislative gap. NWAC ensured that these individuals had every opportunity to participate and share solutions and recommendations in a safe and accessible way. NWAC is in full support of good governance, and supports a balance of collective and individual rights of peoples and persons in the communities where they live and belong.

The MRP Solutions initiative created a safe and comfortable environment where First Nations women shared their thoughts, ideas, and most importantly their solutions for matrimonial real property. These solutions came from their own experiences, knowledge and culture. NWAC believes that it was critically important for the voices of women to be heard and therefore conducted a process that was inclusive and empowering for women. The activities undertaken during this initiative allowed NWAC to bring the women's contributions forward to the next phase where we will seek to establish consensus with our partners on the best solutions.

Timelines

On June 20, 2006, the Minister of INAC appointed Wendy Grant John as the ministerial representative to lead the process along and seek consensus on a solution to MRP.

On September 29, 2006, NWAC, AFN, and INAC jointly announced the beginning of their Canada-wide consultation process.

NWAC conducted the information gathering activities that form the basis for this report between September 29, 2006 and January 29, 2007.

Vision and Principles

The overwhelming response of Aboriginal women was essential to the NWAC MRP Solutions initiative. The following vision and principles were directly developed from the words of the women. As NWAC moves forward to achieve consensus on solutions with our partners, this vision and these principles will guide our process of reclaiming our way of being.

Vision

Reclaiming Our Way of Being: a balance of healthy individuals, families, communities, and nations that are grounded in our traditional teachings and knowledge.

Principles:

Process

Our stories are who we are. The voices and stories of Aboriginal women have been the central source of our solutions to MRP.

Women

Women and children have always been integral to the traditional laws and values of their nations.

Women are honoured as the givers of life.

Women provide leadership in rebuilding our communities. Their skills and knowledge give them an essential and equal role in the community.

Children

Children are a sacred gift from the Creator.

Children have a right to be raised within their family, their culture, and their community, and to live in a healthy and safe environment.

The well-being of children is best met by their parents finding solutions that consider the needs of the children first.

Men

Men are our equal partners.

Men provide leadership in rebuilding our communities. Their skills and knowledge give them an essential and equal role in the community.

Men contribute to and benefit from strong and respectful families.

Elders

Elders are the carriers of our traditional knowledge, and through their guidance and oral teachings they will help us reclaim our way of being.

Governance

Good governance and accountability is critical for healthy and viable communities.

Communities

First Nations communities are diverse.

While First Nations peoples face common issues, those communities located in remote or isolated locations may experience unique challenges, which must be considered in the MRP solutions.

The role of the federal government
While many of the solutions are community based, it is imperative to understand that these community problems arose as a result of federal legislation and policies or lack thereof that discriminated against Aboriginal peoples and persons.

The following section outlines specific concerns that were identified by participants. Each is briefly described below, followed by the identification of long, medium and short terms solutions that will result in achieving our vision.

Re-claiming our Way of Being: Identifying Solutions

NWAC believes that solutions to the MRP issue must come from the people themselves. Throughout the MRP Solutions initiative, NWAC invited participants to speak of their experiences, the barriers they faced, and what they needed to move forward. The solutions identified incorporate the principles acknowledged at the beginning of this paper as well as the issues and concerns that were raised by the participants. These solutions encompass judicial and legal changes, which may be rooted in Indigenous traditional teachings and processes, as well as social and well-being concerns that must be addressed to support Aboriginal women, children and families.

The solutions generated through the MRP Solutions initiative have been grouped into six broad themes: Intergenerational impacts of colonization, violence, justice, accessibility of supports, communication and education, and legislative change. Each theme is briefly described below; the description is followed by the short, medium and long term recommendations. A summary of the recommendation can be found in Appendix A.

Intergenerational Impacts of Colonization

The *Indian Act* itself was created on government assimilation and cultural genocidal policies. These assimilation mechanisms such as the intentional placement of children into residential schools and “the 60’s Scoop” (referring to the unjust mass removal of Aboriginal children into the child welfare system) have created intergenerational effects on the individuals and families who experienced them, and are often mentioned as contributors to the break down of matrimonial relationships. The fundamental Indigenous teachings about relationships between women and men and the roles of each in society, as well as the responsibilities each had to the other, to their extended families, to their communities, and to Creation were replaced by notions which flowed from larger society, where women were viewed very differently.

Short Term Solutions

Federal legislation must include a retroactive clause to financially compensate Aboriginal women and their descendents who suffered a loss as a result of the *Indian Act* legislation

Too often women have had to leave their communities to protect themselves and their families from violence, and have also suffered losses due to the lack of protections for Aboriginal women under the *Indian Act*. Minimizing the intergenerational impact of colonization is an important objective as women are already marginalized within the greater Canadian society.

Compensation will alleviate some of the personal challenges and financial difficulties faced by women and their descendants who suffered as a result of family breakdown and loss of real property due to the lack of protections afforded women under the *Indian Act*. This lack of protections goes beyond the simple lack of mechanisms to address the loss of matrimonial real property after the breakdown of a relationship, but extends to all the impacts of colonialism that all Aboriginal women have suffered.

Membership and citizenship legislation and policies must be revised to provide choice for women and their descendents regarding band membership

Currently, band membership is ascribed: individuals are assigned membership under regulations that do not always take their personal wishes, needs or interests into account. Throughout the Solutions initiative participants suggested a number of alternatives to band membership policies and emphasized that the ability to make a personal choice was important. These choices included being able to establish dual membership for the children of a marriage where the parents came from different First Nations, and women being able to choose whether to transfer her membership upon marriage, separation, divorce, or the death of a spouse.

These choices will enable Aboriginal women to make decisions in the best interests of themselves and their families.

The Aboriginal Healing Foundation and all Aboriginal healing and wellness programs must be expanded and adequately resourced to better address intergenerational impacts of colonization

Colonization and its impacts have had a strong and negative impact on individuals, families, and communities. Despite this history, the women who participated in the MRP Solutions initiative believed that the community could heal, in part through the use of holistic and culturally-appropriate programs such as those described above.

> *"Healing starts with me, then my family, and then my community. The healthier we are, the more stable we are, the stronger.*

Healing and wellness programs need to be further expanded to assist in this process of strengthening individuals and communities. The agencies and organizations that deliver these programs must be adequately funded so that programs may be delivered to all Aboriginal people in need. In particular, the programs must be accessible to those who live in remote and isolated communities, where distance and lack of local infrastructure makes access to programs more difficult.

Medium Term Solutions

A mechanism is developed to implement compensation for the lack of protections for women and their descendants including disenfranchisement from First Nation communities and loss of language, culture and identity as a result of MRP concerns

A community-based mechanism needs to be developed to implement the compensation process described above in the short term solutions, which is created to compensate women and their descendants for the lack of protections, including disenfranchisement from First Nations communities, and the loss of language, culture, and identity as a result of MRP.

Gender based impact analysis of the Aboriginal Healing Foundation and healing and wellness programs be resourced for improved effectiveness for Aboriginal women, children, and families

NWAC has heard the call from participants to increase and to expand Aboriginal healing and wellness programs, in order to facilitate the healing that must take place in communities.

NWAC is taking this call one step further; recommending that a gender-based impact analysis be conducted of these programs. The previous work undertaken by NWAC has shown that Aboriginal men and women have suffered different experiences throughout the colonization process because of their gender. European values did not respect women nor their contributions to society in the way Aboriginal cultures did. As a result, the role of Aboriginal women was disrespected in Aboriginal communities, along with the honour they once had.

A gender-based impact analysis will ensure that healing and wellness programs are addressing and meeting the needs of both Aboriginal men and women. Through this analysis, programs will be able to see where there programs are having positive outcomes, and if necessary, modify programming to take into consideration the distinct experiences of Aboriginal men and women, and where appropriate, address gender-specific issues.

Repatriation programs are developed and resourced for communities to embrace their members

The assimilation policies of the Federal government has resulted in the loss of status, band membership and identity for many First Nations people. Enfranchisement and "the Sixties Scoop" are two well-known examples of assimilationist policies. A less acknowledged example is the loss of status or band membership of Aboriginal women who marry a non-status individual or a status individual from another band.

The passing of Bill C-31 which reinstated Indian status to many individuals, created confusion and pressure for Aboriginal individuals and communities. First Nations were required to accept people back into bands and communities without adequate resources to do so. Many individuals who were finally able to return to their communities found that they were greeted as strangers. One participant commented:

> *"…there is a repercussion still today in our community … We have women that came back home, still homeless so to speak because they are not honouring that Bill C-31. So those kinds of things are still doing that control type of stuff against the women and children we might as well say."*

Currently First Nations communities and other Aboriginal communities lack the resources and funds to establish programs to help repatriate those women and their descendents. Education programs for community members and individuals returning to communities are critical in the repatriation effort. These activities will result in positive changes, as described by one participant who stated that:

> *"… you feel like there is an evolution going on and growth happening in leaps and bounds but it starts with the children. As soon as we started working with the children everything started changing, and women as well as their men become engaged when they see something good for their children and now you're not on opposing sides…"*

Long Term Solutions

Break the cycle of intergenerational impacts of colonization and create the space to re-instill pride in Aboriginal identity and improve self-esteem

Throughout the MRP Solutions initiative the theme of colonization was raised, especially in terms of how it affects Aboriginal women and their lack of human rights. The intergenerational impact is that the colonial process impacts one generation of women after another. Traumatic events and harsh treatment, which are the consequences of the colonization process, which were experienced by grandmothers, continue to affect their daughters, granddaughters, and future generations. One participant described the effects of colonization as:

"…we became non-persons. We couldn't vote. Our women couldn't vote. Our women had no say whatsoever."

There was general consensus amongst the Aboriginal women who participated in the sessions that colonization was a causal factor for a number of related difficulties and issues on reserves. The process of colonization covered a number of interlinked actions, including the introduction of the *Indian Act*, the imposition of Band Council government and the use of assimilative mechanisms such as residential schools. Participants advised NWAC that:

"…it's about who we are in our community. It's about what we want to accomplish. It's about the sharing of our life history, so our leaders, whoever they may be, can take that and put it into the language that needs to be looked over for the legislation..."

"It's not colonization that moves me about in my community, it's my values and my beliefs that makes me decide what I want to decide in my decision making."

Women and their descendants will gain redress for the lack of protections they experienced under the Indian Act

Participants clearly identified federal government legislation and specifically the *Indian Act* as a contributor to the devaluation of women in First Nations communities. One participant described:

"…the racism, the apartheid notions and the discrimination within the guts of the Indian Act."

Almost every woman who described her experience with MRP included information about the losses she experienced, and women generally felt that there was a need for revisions of discriminatory legislation such as the *Indian Act*. The provision of redress for the lack of protections will enable women to work towards breaking the cycle of intergenerational abuse by providing them with the tools and resources they need to take action.

Violence

Through the MRP Solutions initiative and previous work undertaken, NWAC has established that violence against Aboriginal women in all its forms is the single most important issue that confronts us. The issue of systemic and structural violence against Aboriginal women is compounded by a lack of understanding, sensitivity, and action from community members, service providers, and society in general.

NWAC recognizes that violence against Aboriginal women takes many forms, including violence in the home and in intimate relationships, political silencing, and racialized,

sexualized violence on the streets. Statistics Canada reports that Aboriginal women are more than three times more likely to be victims of spousal violence than the rest of women in Canada.

Through the Solutions initiative process, NWAC has repeatedly heard that the cycle of violence must be broken, and that this must be done through the development of healing and wellness programs. Also, NWAC has heard and acknowledges that these healing and wellness programs must include all men and women, adults and children, and the abused and the abuser.

Participants also made it clear that while First Nations communities must immediately begin the process of healing themselves, the federal government, particularly the Department of Indian and Northern Affairs, must acknowledge the negative impacts that its racist and assimilative policies have had on generations of Aboriginal individuals, families, communities and nations. In addition, INAC has a due diligence to commit resources to address the negative impacts their policies have had on Aboriginal peoples and persons.

Short Term Solutions

NWAC is provided with resources to develop an effective national strategy to stop violence against Aboriginal women, children and families that contributes to matrimonial breakdown

The specific needs of Aboriginal communities must be considered when addressing violence. Because of racist and sexist legislation, Aboriginal people face a type of violence not experienced by the larger Canadian population. The need for action to end violence against women was called for time and again throughout the consultation process.

While there was not a specific request made by an individual participant for a national strategy, the solutions the women articulated can be best achieved through such a strategy. The nature of NWAC's work makes it an ideal apparatus to develop an effective national strategy to stop the violence against Aboriginal women and children that contributes to matrimonial breakdown.

Implement enforcement orders

Many participants talked about the lack of policing in First Nations communities, as well as the absence of policies or procedures to be followed in the event of a domestic dispute. In order to ensure the safety and well-being of Aboriginal women and children, orders made under the provisions of family and criminal law must be enforced. Too often, women spoke of situations in which they had appealed to law enforcement personnel for assistance, but were unable to get help. One participant said she was:

"…very concerned about the enforcement. Even if we get something big,

wonderful, all encompassing beautiful document that's going to help us forever, how do you enforce it, especially in the isolated communities? Hey, you've got a gun at your head and there's no police around you, what do you do? You take off and you leave. So I mean the enforcement to me has to be well thought out and we have to have the cooperation of the justice systems in this."

The reasons underpinning this lack of enforcement action vary: they may include a lack of knowledge about the enforcement of restraining or other orders on reserve, a lack of capacity to provide personnel who can ensure enforcement, or a perception often based on real experiences that these concerns are of a lower priority than other demands on their time and resources.

Increased transitional housing for women, children and families

When a woman is unable to remain in her marital home, due to the breakdown of her marriage or due to concerns for her safety if she remains in the home, she requires assistance and immediate shelter. One way that this right to safety and shelter can be met is through the provision of transitional housing, or similarly related safe house networks.

A recurring recommendation made by participants was that additional, appropriate transitional housing for women, children, and families should be made available immediately. This would allow women to access the short and medium term supports that would assist them in making healthy choices about their next steps following the end of their relationships. One woman commented that:

"When my marriage broke down I felt like I had no where to go and no one to guide me."

There is a need for transitional housing that is accessible to women who live in remote or isolated areas: they report that they are often unable to access the programs and the supports available at these sites due to a lack of transportation, the cost of transportation, or eligibility barriers. One participant commented that:

"There should be some type of transitional houses on reserves … this would enable members to stay in their communities."

Clearly, the provision of transitional housing on reserve is not yet sufficient to meet the needs of women and children experiencing the loss of their marital home due to a relationship breakdown.

Formalize and recognize the role of Aboriginal women's organizations as an official stakeholder in policy and program design and initiatives

Women who participated in the Solutions initiative consistently identified the need for women's voices to be heard. They frequently identified the importance of women being involved in all steps to find solutions, and spoke of the power of women working together

to find solutions. NWAC believes that the work done by women at the grassroots level can be assisted by Aboriginal women's organizations, especially if those organizations have a formal, recognized position as stakeholders in the policy and program design initiatives.

Medium Term Solutions

Subsidized and affordable housing be provided in a safe and healthy community

Participants in the National Consultation process warned that the present housing shortage exacerbates the issues associated with MRP. Lack of housing has been identified as a reason for women staying in abusive relationships. Therefore subsidized and affordable housing provided in a safe and healthy community must be made a priority, both on and off reserve for Aboriginal women and children. This is clearly illustrated in a comment made by a participant on the issue of housing:

> *"Certainly we need more services on reserve but for a woman who needs to make the choice for safety reasons; you know there needs to be services and supports elsewhere as well. So I don't think it should be an either/or. Options are great because you can meet your own particular need."*

Impact assessment to evaluate the impacts and gaps of existing programs and services which address violence, including shelters and transition houses and to provide additional resources where needed

In all input channels of the Solutions initiative, participants called for increased resources for housing, transition housing, shelters, and other support services. To respond to this call for action, NWAC suggests that impact assessments be conducted on existing family violence related programs.

This impact assessment will measure the effectiveness of programs and services and will indicate where additional resources should be provided to those programs demonstrating additional needs. One outcome of the MRP Solutions initiative has been to increase the knowledge and the awareness of Aboriginal women about MRP and related issues. NWAC anticipates that this increased level of knowledge will result in a larger number of women requesting access to programs and services, which will lead to greater voicing of demands that must be met.

Investigate promising practices for developing healthy communities

In addition, an initiative to investigate promising practices for developing healthy communities should be conducted. The end result will provide all communities with resource tools to move their communities down the healing path. A participant expressed the following thought:

"I would like to see a way to collect a history of our practices. Do some research into our practices and this would involve going to our old people, finding out what they remember and documenting it and taking that information and sharing it with community members. Share the awareness..."

Provide transitional housing for men

The idea of providing transitional housing for men during times of marital difficulty was also raised during the Solutions initiative. In the event of family violence, participants suggested that enabling the women and children to remain in the home, by providing an alternate space for the man, would be less disruptive to the family unit. Elders spoke of traditional approaches that followed this practice, saying:

"… he is asked to leave because that is her home and that's her womb and that's her children. That's natural law.

Creating transitional houses for men would bring the added benefit of increasing their access to the programs and the supports that are usually delivered through these sites. These include counseling, personal supports and referrals to other services that could aid men in resolving the issues that led them to the transition house. This solution would therefore benefit men through the provision of temporary accommodation and access to services, while benefiting women and children by enabling the marital home to continue to be a safe space for them. One participant reminded the group of the impacts of violence on the children, stating that:

"We know about the cycle of violence and all of that so that if children, you know, if we can help the children in this process, then I think that will help in the coming years, decades and generations. That's all."

Long Term Solutions

Violence is unacceptable

For over 32 years, the Native Women's Association of Canada has taken the position that violence in any form is unacceptable. NWAC has always advocated the right to live free from violence will allow Aboriginal communities to thrive, and allow all community members to reclaim their ways of being. Communities free of violence foster trust among their membership and re-instill pride in their peoples.

Communities utilize a collective culturally-relevant approach to resolving conflict

Traditionally, First Nations peoples had a collective responsibility for the well-being of the community. This responsibility included providing assistance to community members

who require help to resolve conflicts, including those between partners. One participant stated:

> *"…if it takes a community to raise a child then it takes a community to bring that family, bring it together, [to] help."*

The use of a collective, culturally relevant approach to resolving conflict by communities will result in the fair and equitable treatment of both partners in finding solutions to MRP issues. This often includes gender-specific solutions that honour the specific roles played by women.

Implement or expand the application of promising practices for developing healthy communities

The results of the investigation of promising practices that is recommended as a medium term solution will allow for the implementation or expansion of the practices. We believe the further application of these best practices will aid in the further development of healthy communities.

Justice

Justice, access to legal services, and enforcement of court orders were common themes raised by participants throughout the MRP Solutions initiative process. Participants also discussed issues around policing and protection services, as well as access to legal aid and legal professionals knowledgeable on MRP issues. The solutions recommended below will provide First Nations communities with the opportunity to enhance their delivery of justice programs and ensure the protection of women and children. These solutions will increase access to justice programs and services for Aboriginal women and families who have been negatively impacted by MRP issues.

Short Term Solutions

Improve access for Aboriginal women to judicial processes which should take into consideration the unique needs of semi-remote, remote, and isolated communities

The lack of supports and infrastructure for women faced with issues related to MRP was a re-occurring theme expressed throughout the MRP Solutions initiative. Over and over, NWAC heard the frustrations of many Aboriginal women who tried to access judicial processes, but were unsuccessful due to barriers such as finances, remoteness, and lack of services. The barriers to judicial processes can be prohibitive and often lead to women staying in unhealthy and abusive relationships.

Accessing legal advice is a costly endeavour. Participants described how the expenses associated with even simple legal processes place them out of reach for many Aboriginal women and their children, who face the highest rates of poverty over any other population in Canada.

NWAC also heard situations of Aboriginal women who fell through the gaps of legal aid because they were employed. And while these women were unable to access legal aid due to their income, their wages were not sufficient enough to cover the associated costs.

> *"To be eligible for legal aid, I would have to quit my job."*

A further barrier to have access to any judicial processes is the remoteness of many First Nations communities in Canada. Distance is a barrier for women living in remote or isolated communities. With no services in the communities, Aboriginal women who wish to access judicial processes are forced to travel outside of their communities. And once again, the burden of the cost of travel usually falls on the women. One participant commented:

> *"A lot of times these women have to leave the communities to come into urban cities and urban towns to access the family judicial courts"*

Also, the difficulties associated with this travel to access justice often result in women deciding not to attempt to access justice because of the difficulties, or having this outcome imposed on them by default.

In response to the issues identified above, participants felt that access to legal aid and to advice in First Nations communities would help alleviate some of the issues surrounding MRP.

> *"They have legal aid available in the cities and we should have access to it. There needs to be legal aid support within communities, even if there are two lawyers per community. Every reserve has a lawyer for their land entitlements…"*

The justice system must enforce court orders, Band bylaws, and other legal orders.

Participants in the national MRP Solutions initiative also commented that there is not enough policing that deals with matrimonial real property as a means of enforcing maintenance issues. This leads to ineffective enactment and enforcement of court ordered payments. Most see on reserve policing as inadequate. This issue is clearly illustrated by one woman's concern:

> *". . . when proper legal processes are taken they too are often powerless and not worth the paper they are written on. For instance there is not enough policing that deals with matrimonial real property as a means of enforcing maintenance issues. This leads to ineffective enactment and enforcement of court ordered payments. Most see on reserve policing as inadequate. Many speak of the fact there is little regard or sensitivity for women's issues."*

Development of multi-staged systems of Aboriginal mediation or other appropriate Aboriginal systems and practices for justice/decision making under MRP.

Participants consistently called for the creation of an independent body to act on the needs of First Nations people for justice, especially for women. This body is envisioned as one that would use Aboriginal systems, languages, and cultures to achieve sound and appropriate solutions.

Participants suggested alternate methods that could be used to achieve these results, such as:

> *"That these ombudsman people would hear the cases and on the merits adjudicate the cases and I think that would be fairer for all parties concerned, especially in the case of children."*

Another approach would be to establish an independent Aboriginal women's representative to protect and promote matrimonial property rights and to establish a specialized First Nations tribunals.

Assessment and evaluation of the impact of MRP measures implemented under First Nations Land Management Act (FNLMA)

Some participants were aware that First Nations communities are implementing MRP Codes under the provisions of the *First Nations Land Management Act*. There is considerable interest in this process, especially in the identification of transferable best practices that are appropriate for other First Nations. Unfortunately, there was also an evident lack of information about the *FNLMA* experiences to date of those First Nations engaged in this process. Information on the status of this initiative is not reaching Aboriginal women at the community level.

The evaluation could include several features. An outline of the challenges and opportunities inherent in implementing MRP codes under this legislation would assist in determining whether current resource levels are sufficient, and what capacity challenges need to be met. A review of the outcomes and impacts that have resulted from the MRP codes that have been implemented to date would provide information about best practices and unintended consequences that would be of value to other First Nations that are developing MRP codes. The completion of a gender based analysis of MRP codes completed to date would enable First Nations communities and INAC to assess how well the requirement that these codes not discriminate on the basis of sex is being met. This evaluation should be planned and conducted as quickly as possible, so that valuable information is not lost through the passage of time. This information will result in improvements in the safety and well-being of women and their families, and could be shared among all First Nations. This process must involve the full participation of Aboriginal women.

Medium Term Solutions

That legal professionals and the justice system receive training regarding on reserve Aboriginal rights issues

Many participants discussed situations in which they sought legal help during the breakdown of their matrimonial relationship but were unable to access such support due to the lack of knowledge of MRP issues by legal professionals. One participant expressed the following:

> *"In my case the lawyer didn't know the reserve land issues and rights of Native people."*

Aboriginal women must have access to informed legal advice from professionals knowledgeable on the issues of MRP, as well as First Nations law and the inherent rights of Aboriginal peoples. The training that will achieve this goal should be conducted for all legal professionals and associated positions. In addition, knowledgeable First Nations individuals and organizations should be involved in all stages of this training initiative. This will enhance the content and delivery of the training.

Long Term Solutions

Implementation of a community-based, culturally-appropriate Aboriginal conflict or dispute resolution system by First Nation communities

The employment of culturally appropriate mechanisms best facilitates the process of finding meaningful ways to equitable resolution to matrimonial real property conflicts. The implementation of a community-based and culturally appropriate Aboriginal Alternate Dispute Resolution System by First Nation communities means the fair and equitable treatment in the division of matrimonial real property. This is consistent with the traditional practice of the community being collectively responsible for the well-being of the community and individuals, including supporting healthy marriages:

> *"So dispute resolution is one way, and so give it a thought. It's almost like a sentencing circle; it's almost like that within the community. If it takes a community to raise a child, then it takes a community to bring that family, you know bring it together."*

Accessibility of Supports

The concept of accessibility to supports and programs encompasses several levels of meaning. The primary issue expressed by participants was that one consequence of MRP is that the accessibility of supports and programs decreases following the breakdown of the marriage or the relationship. Other issues related to the accessibility of supports expressed by participants during the Solutions initiative included geographic location, eligibility criteria, and band membership.

Short Term Solutions

Increase the funding of programs to support Aboriginal women and children to prepare them for healthy relationships and to support them during the breakdown of matrimonial relationships

Participants described being unable to access programs and services following the dissolution of their marriage or partnership because space was not available, because programs had been discontinued or reduced, or because of eligibility criteria unrelated to the need for service, such as minimum or maximum age restrictions.

Women expressed concerns about the availability of programs and services in general, as well as the levels of assistance provided by these programs. They recognized that accessibility is unequal across the country, due to the division of responsibility for providing programs and services, as well as differing provincial and territorial policies regarding eligibility and funding levels for supports.

An increase in the levels of funding for programs and services supporting Aboriginal women and children would allow for the elimination of barriers to access and enable all women needing programs and supports to get the help that they need.

Ensure that Aboriginal women can access programs and supports both on and off reserve, including those living in semi-remote, remote, and isolated communities

Women who are unable to resolve a MRP situation on reserve frequently move off reserve to access housing because they cannot find alternate safe and appropriate housing on reserve. As a direct consequence they become ineligible to receive supports or programs delivered through the Band Council. This is because access to these supports and programs is limited to members who reside on reserve. The spouse who moves is immediately disadvantaged compared to the spouse who remains on reserve.

Women who participated in the MRP Solutions initiative process repeatedly alluded to this loss of access to supports and programs delivered through the Band Administration. At one session, a participant described how:

> *"…once you leave the reserve as a treaty status woman, once you leave the reserve, the money stays for education, housing, all the needs, all the funding that goes for your per capita to the reserve stays there. It does not follow you. Then I've got to dress up my children, pay for school supplies because I live off reserve, I don't get any help from my band…."*

Another issue related to accessibility was described by women who had married men from another First Nation community. Although the practices associated with the registration of membership are changing, there are still issues related to the existence and

the nature of membership from one First Nation to another. Women who do not have membership in their partner's First Nation may not be able to access supports or programs following a relationship breakdown, even if they continue to live on that First Nation's land. There are also situations where the mother and children have different First Nations memberships. This may create accessibility issues for the children as well as for their mother.

> *What we've started to see now is that we cannot provide services to some of our children on the reserve because they are not status under the legislation of Bill C31. So when we're talking about matrimonial real property, in terms of where and who has responsibility for these children … it's going to start conflicting within the community because … we have some of our population saying it's for status only, they're not wanting to recognize the impacts of Bill C31*

Women living in semi-remote, remote, or isolated communities were unable to gain access to programs or supports such as Legal Aid, transition housing, and court dates as well. In some cases, these supports or programs are only available at certain times of the year, or on a limited schedule throughout the year. Other supports or services are only accessible if the woman is able to travel a greater distance than is commonly required in the southern urban centers. The ability to even complete such travel may be severely limited for women who live in remote communities, due to the high cost, limited schedules, and inclement weather conditions. The funding formulas used for programs and supports should also recognize and address the increased costs associated with providing services in remote or isolated communities.

Developing solutions that address accessibility will benefit all Aboriginal people. In the short term, policies and eligibility requirements must be evaluated to determine what systemic barriers to access are entrenched in the design of programs and services. These barriers, whether geographic or linked to other design criteria, such as age restrictions or residency, must be challenged and changed.

Medium Term Solutions

Develop a mechanism to provide a continuum of services for transitional ongoing support for Aboriginal women and children

There will be challenges associated with the design and development of a mechanism to enable the provision of a continuum of services for transitional, ongoing support for Aboriginal women and children. Although many First Nations deliver similar menus of programs and supports, the differences between them in terms of membership, economic base, community health and proximity to urban centers suggests that a flexible, adaptive approach will be necessary.

Long Term Solutions

Aboriginal women and children are able to access their benefits under the Indian Act regardless of their residency

The situation described above does not have to exist. Aboriginal women who are experiencing MRP issues do not have to lose access to programs and supports. One participant at a consultation session stated that in her community:

> *"…we looked after everybody the same. … So we don't really abide by the department's rules. By us doing that though, we run into problems with our self-government agreement because the programs are only available to status people. They're not available to non-status. So, the First Nation carries a lot of the load there."*

This long-term solution to MRP would utilize a rights-based approach that would enable women and children to access their treaty, membership, Aboriginal rights and equality regardless of their residency. This approach would result in women being able to access programs and supports delivered through their Band Council based on their need for these services, rather than being denied such supports because of their place of residence.

Communication and Education

The MRP Solution initiative brought to light the lack of knowledge of MRP issues and the rights of Aboriginal women. Participant comments from the sessions reflect the recognition that Aboriginal women need to understand the issues that affect them in their daily lives. The comment below is representative of many Aboriginal women in Canada, who face barriers to their well-being on a daily basis but are not aware of the underlying factors:

> *"I was just looking at the grassroots level of education, because I'm just here, there are a couple of us but there is so many women at home right now today that have no clue, don't understand what this is all about and from the grassroots level we should have more education, consultation or something important from now before it changes."*

Along with education, participants identified communication as an important tool to ensure that women are informed on MRP and related issues. There were calls for access to forums or avenues to raise awareness of issues that affect women. Participants identified opportunities for raising awareness of MRP and women's issues such as women's councils at the community levels and band or community meetings in which time on the agenda may be devoted to addressing and raising awareness of women's issues. It was evident that participants strongly believed that communication and education are critical to the well-being of Aboriginal women.

Short Term Solutions

Develop, implement and resource an ongoing faciliation and communication process to increase the understanding of Aboriginal women and communities on MRP rights, policies and processes.

The Solutions initiative highlighted participants' lack of knowledge around issues related to MRP. NWAC repeatedly heard the call for more information and education, primarily around MRP, as a way of empowering Aboriginal women. The education of all individuals involved in the MRP process is important; topics should include the MRP process itself, the rights of Aboriginal women, and traditional teachings and knowledge. This increased understanding would assist women such as the participants who commented that:

> *"I should have been able to stay in my community with my kids and should have had access to information from the community. I needed information regarding educational opportunities and social services."*

> *"Women need to be better informed and aware of their rights and options."*

The provision of ongoing facilitation and communications that support education and information-sharing on MRP was seen both as a way of empowering Aboriginal women as well as assisting communities to move forward. Participants called upon NWAC to be resourced so that they may provide leadership on this recommendation:

> *"NWAC should have tool kits (communications, materials, financial and person resources) ready for communities to use. The reasons for a split up aren't the focus here. Division of assets, fair treatment and kids are."*

Medium Term Solutions

Establish mandatory federal/provincial/territorial policies for funding and implementation of Aboriginal Studies curriculum

The participants in the Solutions initiative repeatedly called for First Nations people to improve their knowledge of traditional ways of being. Learning is closely linked with the formal education system, where youth learn values and beliefs premised on the mainstream Canadian society. This imposition of a different belief system on Aboriginal children can act to continue colonialist belief systems. As one participant suggests:

> *"It is important to educate ourselves to protect our spiritual, physical, mental and emotional rights."*

Implementing a school curriculum which allows young people to learn about their rights and traditional ways will help to improve the likelihood that these young people will not have to grow up in a biased, patriarchal society as their mothers and grandmothers did. The creation of an Aboriginal Studies curriculum that rectifies the lack of Aboriginal content in the current school curriculum would benefit all Aboriginal children. A participant stated that:

> *"Because INAC funded school systems on reserve, a stipulation of the funding should include that children be taught about treaties, matrimonial laws, Indian Acts, Bill C-31, and local by-laws."*

The development and implementation of this Aboriginal Studies curriculum must be done by Aboriginal people.

Provide additional resources for education and upgrading training to increase employability of Aboriginal women to enable them to rebuild their families, communities and nations including the need to change eligibility requirements such as restrictive funding age limits

Many participants expressed a need for education or training that would enable them to obtain employment and be self-sufficient in terms of providing for themselves and their children. One participant stated that:

> *"Certainly training needs to be an issue. If we are going to try and implement something in community, there needs to be training when you look at how much investment people put into property, you need to have people who understand what investment means."*

The void of knowledge of matrimonial real property and the rights of women is dramatic. A way of rectifying this issue is through an educational process. There is a dire need to educate Aboriginal women about the process, their specific rights and the mechanisms which are required to make it function effectively. As one participant stated:

> *"I should have been able to stay in my community with my kids and should have had access to information from the community. I needed information regarding educational opportunities and social services. A lack of education for women in First Nations communities is a result of nepotism. Band Council families are typically first to access educational funding."*

Create a special fund/program specifically for women following marriage breakdown for education, training, economic development, and small business development with no eligiblity barriers

Throughout the Solutions initiative, participants discussed eligibility barriers to various supports that they faced. Participants who had experienced martial breakdowns and found

themselves thrown into the role as single mothers, found it difficult to access any supports, other than education funds. Training, economic development, and small business funds were usually unavailable to them because many of those programs target youth under the age of thirty.

In the event of marital breakdowns, single mothers wishing to enhance their skills had no other option than to attend post-secondary education. Child care funds are difficult to access or are insufficient, and if a single mother chooses to return to school, she must carry the burden on her own.

It was recommended by participants that a specific pool of funding for training supports be set aside specifically for women who have experienced the breakdown of a marriage. Specifically noted was the need for childcare for those single mothers who wish to access training, but require support to do so.

Long Term Solutions

Individuals, families, communities, and nations will have resources and rights-based knowledge to build healthy, viable, and sustainable communities

Communication plays a critical role in helping to build, healthy, viable and sustainable communities. First Nations needs to communicate effectively, with one another, with the government and other partners about their needs and resources which are necessary to create healthy loving communities. Communication is also a viable asset when seeking solution that will help rectify communal issues, an example which was addressed through out the consultation process was that of human rights, particularly those of women. Resources are needed to help restore a sense of equality between women and men. The Aboriginal women could regain their rightful place as equal partners within the community. Programs and resources are needed which will have focus and draw the interest of community members, so that they may see this as a positive means of rebuilding. As one participant stated:

> *"Communication with communities is a problem. We need creative ways to get information to the women in the community. Introduce a curriculum in secondary schools regarding marriage, common law relationships, and traditional systems. Funding should be provided for women's education."*

One area in which women felt there were no resources was that of women and law which specifically relate to their situations. Several women questioned what their rights were, how they go about accessing information about divorce, prenuptial agreements etc. Women felt that they lacked information on scores of policies that affect them. As one woman stated:

> *"Our whole lives are driven by policy and we spend our life thinking about policy-we are thinking about Elections, membership, land claim, and MRP."*

Women felt that there is a need for advocacy on their part, and even a greater need for resources to help support them. Resources at the community level are very limited. As one woman describes the lack of resources in her community:

> *"I approached the community about couple counselling, for help. But Indian Affairs doesn't provide counselling. Went a year with no help, the only help we got was from the Church, it helped me but not my husband, the church just didn't meet his need, this kind of counselling was not available immediately."*

Another participant stated the same in relation to her community especially for young people and their relationships, thus perpetuating the inter-generational aspect of problems.

> *"There is nothing available, here are no couples counselling, there are no parenting classes, families started younger and younger, but there are no supports. There are no models in place that show what healthy relationships look like."*

Overall, resources are required in the communities because of the disenfranchisement they have faced over the years. Systems such as reserves, removal of children from families, residential schools and discriminatory legislation, poverty and racism have left communities in dire straights. Aboriginal women, and children in particular, paid a heavy price because they have experienced unprecedented violence. To revitalize traditional knowledge and to heal, funds are required.

Legislative Change

The Matrimonial Real Property situation is often described as a legislative gap. This characterization of MRP leads to solutions that are based in legislative change. There are a variety of legislative approaches that could be employed and each has to be considered in relation to the standards required as part of the law-making process, including the duty to consult, Aboriginal rights, the equality of women and men, international law and the Canadian Human Rights Act.[1]

As part of the MRP Solutions initiative, NWAC was requested to share three legislative alternatives suggested by INAC with participants. Every activity undertaken under the MRP Solutions initiative included a discussion of these alternatives with participants. The level of knowledge expressed by participants varied widely: some were unfamiliar with legislative approaches to resolving gaps, while others were extremely knowledgeable about these processes and the benefits and drawbacks of different legislative alternatives.

[1] Eberts, MRP Discussion Guide, 2006.

Short Term Solutions

Implement overarching substantive federal legislation to protect the rights of women and children living on reserve in the interim until First Nation communities can develop their own laws: this legislation should include opt-out and compensation clauses

Generally, participants expressed muted support of the alternative based on the use of federal legislation to address MRP in the short term. The perceived level of support for this option was increased by the greater lack of support for the alternatives that would employ provincial and territorial legislation to address MRP issues. A number of participants provided similar responses when asked about the use of provincial or territorial law to resolve MRP issues:

> *"I am not in support of anything to do with the Provincial law."*
>
> *"Separate legislation for each Province and Territory would create difficulties."*
>
> *"If we had Provincial law apply on reserve, we would be dealing with an even bigger patchwork of laws, so it would be better for a Federal law to apply in the interim; Provincial law applying on reserve would weaken what little we already have."*
>
> *"Provincial laws are the greater evil."*

The survey that formed a portion of the Solutions initiative asked participants if they thought that "legislative change would be a good approach to resolving" the MRP situation. Almost 65% responded yes, that they supported this approach to some extent.

Overall the activities conducted during the MRP Solutions initiative, a small majority of participants advised that the legislative approach they preferred was for a substantive federal law to be developed on matrimonial real. Participants suggested that federal legislation would provide better consistency than band by-laws, which can be removed or altered by Chief and Council, and that it would provide greater equality in MRP solutions for women living in different provinces. Other participants stated that:

> *"I hope it isn't a policy, that it's a whole amendment to the Indian Act, but the money has to be attached to it."*
>
> *"I think … that would be better for us as well in regards to matrimonial law to have federal law rather than provincial law."*

There was a clear and sizeable minority opinion among participants that neither federal nor provincial law should be implemented to resolve MRP issues on reserve. One participant cautioned that:

> *"We don't necessarily have the best relationship with the colonial state and I would venture to argue that our interests are not always their interests."*

This opposition to legislative approaches is particularly marked in some regions such as Saskatchewan and Prince Edward Island. Another participant said that she preferred:

> *"None of these alternatives: a good start would be protecting the human rights of First Nation women."*

These views raise important concerns that must be considered and brought forward as part of the ongoing process to resolve MRP issues.

As part of this solution, NWAC proposes that federal legislation should include a compensation clause in order to provide redress for women and their children who have been negatively affected by the lack of MRP solutions in the past. An international law prism should be used. NWAC also suggests that this legislation should include an opt-out clause. This will enable First Nations who develop their own laws on matrimonial real property to opt-out of the federal legislation at any time in the future in order to implement their own laws. Such a solution meets the dual goal of promoting the equality rights of Aboriginal women and the right to self-determination of Indigenous peoples.

Medium Term Solutions

An enabling body consisting of Aboriginal women and First Nations representatives should facilitate a consultation and development process based on Indigenous law approaches for the resoltuion of MRP that is appropriate to each First Nation

Participants expressed concerns about the resources, capacity, consistency and consensus that will be necessary as First Nations move towards enacting their own MRP laws. One commented that:

> *"I believe very strongly that we have to develop that legislation ourselves. We have to believe in that legislation that it's going to work and the only way we can believe in it is if we're a part of its development and in the approval process."*

The results of the MRP Solutions initiative also support the idea of diversity in finding solutions to MRP. While there was strong support for traditional approaches and the use of First Nations law making capacity to deliver solutions, participants also acknowledged that some individuals follow different paths, and that these differences must be respected. Human rights must be protected at all times. One participant advised that:

> *"You are entitled to whatever you believe and it may be traditional or the European Christian way but the point of the matter is that*

there is an issue there and that issue is Human Rights and it needs to be addressed."

The creation of an enabling body will support the development of MRP solutions appropriate for each First Nation, while strengthening the process through the identification of standards that should be applied to these solutions. Participants referenced the need for fairness, equality, and independent decision-making as minimum standards. They also requested the use of consultative processes that are based on Indigenous knowledge. This reflects their requirements that the identification and the implementation of solutions are done in a manner that supports women and their communities, rather than in a way that creates further division and conflict.

Long Term Solutions

Communities utilize Indigenous law, which includes equal participation of women, to resolve MRP issues

It became very clear during the Solutions initiative that participants are ready to move forward. Participants indicated through their presence at these MRP Solutions initiative activities that they wish to be full participants in developing and implementing fair and equitable solutions to MRP that are based on Indigenous law. Participants clearly stated that finding solutions to the MRP issue was one that involves and includes both women and men. The solutions must be developed at the grassroots level, and must achieve results that do not merely shift the burden of inequality from one place to another. One participant described how:

"... we need our own laws, our own legislation and it has to reflect our culture. It has to reflect our world views and it has to be sensitive to the things we've seen over the last 200 years … It has to be done holistically."

The result of this collaborative approach to finding MRP solutions will be that First Nations utilize Indigenous law, which reflects the unique needs and interests of their community, to resolve MRP issues.

Communities will use this expertise to approach all decision making in the community

The use of the expertise developed as a result of the MRP Solutions initiative and future work arising from these solutions may result in communities approaching all decision making in the community using Indigenous laws. These laws must incorporate standards of fairness, equality, independence, and justice. Participants were very aware that the solutions identified and the processes implemented should ensure that the basis of action respected First Nations as sovereign peoples:

> *"… the basis of any negotiation, any discussion has to be with that (sovereignty) in mind at all times. Let's not forget that part because we're just not trying to save ourselves from that hurt today, we're looking at centuries of our relationship to ourselves, to our families, to our communities, to the world that, we are who we are, and nobody can take that away from us."*

It is evident that any approach needs to be flexible enough to accommodate the varying situations of First Nations across Canada. Another participant spoke to the same theme, advising that:

> *"…no matter what this legislation that we're going to be developing here; it has to be in recognition of our self-determination as a First Peoples of this country … we are sovereign people."*

The First Nation peoples' capacity to achieve this approach to decision-making would be supported through the implementation of practical supports for First Nations, including those that relate to resources and capacity.

Limitations

NWAC encountered some impediments that constrained the activities undertaken as part of the MRP Solutions initiative. These limitations are described below, together with some related implications for the process.

The short time frame that was available for the activities to be completed was a serious constraint on the success of the initiative. Due to issues associated with the negotiation, funding, and implementation of the contribution agreements, this already compressed time frame was shortened even further. This had a negative impact on several aspects of the process; most notably on the recruitment of participants. The invitations issued to women to participate in the sessions frequently were given very close to the start date of the sessions, due to the compressed time frames. This gave potential participants minimal time to make arrangements to attend. Women did not have sufficient time to arrange for the care of their families and for time away from their jobs, and to make appropriate travel plans, which resulted in their being unable to participant in the sessions, or in the subsequent failure of their arrangements because of their hurried implementation. In either situation, the end result was that women who wished to participate were not able to do so. Many of those participating, opposed the short time frame and wanted more time for a proper consultation process with enough time to obtain the views of women in First Nations communities.

The Solutions initiative also experienced logistic pressures related to the difficulty of communicating with a diverse and dispersed stakeholder group. The women who heard about the process and were able to participate through one of the mechanisms available (i.e. facilitated sessions, confidential survey, public hearings, written submissions,

personal interviews) advised NWAC that they saw value in the process. They frequently expressed concern, however, that the voices of many other women were not being heard, because these women were not able to travel away from their home communities or to access other participation channels, such as the internet. These communication difficulties especially affected women living in northern semi-remote, remote, or isolated communities.

Each of the three partners involved in the MRP Solutions initiative conducted activities targeting their specific stakeholders. NWAC represents Aboriginal women across the country regardless of where they reside, and the NWAC activities conducted under the MRP Solutions initiative welcomed women who live both on and off reserve. While the majority of the NWAC activities were conducted in locations off reserve, upon receiving invitations NWAC also held a small number of sessions that were located on reserve. NWAC is aware that women living on reserve experienced greater difficulty accessing NWAC activities, due to distance, cost, lack of transportation, and concerns about privacy and safety.

There was a tension evident between the desire of women to provide information and opinions to this national consultation effort, and their concerns for their personal safety or security that could be negatively impacted through such participation. NWAC made every effort to enable women to participate safely and for their personal information to be held in confidence. Even so, the act of attending a session could in itself place some women at risk, due to the potentially contentious nature of this topic. This concern for personal safety was especially apparent for women who live on reserve. The small size of some communities, combined with the limited number of options available for transportation meant that the decision to participate in the Solutions initiative could not be guaranteed to be kept a private matter. Some women feared that their safety would be compromised through participating: therefore they did not do so. As one woman commented:

> *"It is important that Federal government leaders recognize that there were women that were invited to attend this meeting, who were unable to come due to threats by spouses or former spouses; some women were afraid to lose their jobs for speaking out."*

The MRP Solutions initiative provided a valuable opportunity to raise awareness about MRP in the community, and it is evident that this awareness raising has occurred. NWAC was constrained, however, by women's general lack of knowledge regarding MRP. While women were willing to share their experiences and thoughts about solutions, the need for further education and awareness building was evident throughout the process.

Conclusion

The connections of Aboriginal peoples to our lands and territories are sacred and historical. These are not just pieces of land, but our traditional territories. This issue of matrimonial property on reserve was not created by Aboriginal peoples. The issue of matrimonial real property on reserve is now a complex one to resolve; however, it should not be. There are many diverse First Nations communities with many diverse processes to address specific land issues. At the present time, all First Nations communities are governed by the *Indian Act* unless they have developed their own Self-Government Agreements. As we have noted, this piece of colonial legislation has had and continues to have detrimental impacts upon our communities. Throughout the years, when the *Indian Act* was amended, it was done unilaterally by the federal government. The patriarchal and patronizing actions of those governments have had numerous negative impacts upon First Nations individuals, families, and communities. There has been much discrimination in the past and it continues to this day. This discrimination has created detrimental impacts upon many generations of youth, women, men, families, and communities across this country.

When the *Indian Act* was amended in 1985 (Bill C-31), NWAC and the AFN made contributions prior to any amendments being made. These amendments (Bill C-31) were, again, created unilaterally by the Department of Indian Affairs. There were and are many lessons learned from that process. One of them is that we do not want to be used as pawns to justify government processes. We are not going to get caught into the divide and conquer tactics. NWAC believes that our communities need to resolve the impacts of colonization and to assist in building healthy communities. We know that our voices are critical to these efforts.

With respect to the issue of MRP, NWAC was appreciative to have at least a short time to consult with Aboriginal women and their children who have had a direct impact of a lack of recourse to their matrimonial home. It was considered the “bridging’ point between the long fight for the recognition of Aboriginal women’s rights and issues arising out of the MRP cases. It was an opportunity for these participants to speak their truth and to have a voice.

However, there were very serious concerns raised by the participants regarding the short time frame for consultations and the turn around for this consultation process. As noted in our submissions in previous Standing Committees, NWAC needed a full year for these consultations. In this process, we were given three months. Many participants were skeptical of this process because they did view it as government driven but delivered by Aboriginal organizations. Based on the way the phases were developed, with only three months of consultation, they were justified in their skepticism.

The participants with whom we consulted wanted to see movement towards successful change and are hopeful that with their participation, any amendments, legislative change, or creation of new legislation will integrate their contributions provided in this process.

This whole process was to re-establish pride and self worth into the lives of participants who felt they were never heard, often forgotten, and disenfranchished. They want their rightful place in society. This process has been a positive step in the right direction of speaking out the voices of Aboriginal women and their communities before implementing changes that affect their rights.

The women who provided solutions in this process are daughters, sisters, mothers, grandmothers and granddaughters. They want the inter-generational cycle of abuse and marginalization to end. They want this to be a collective effort to bring the required change in their communities. Through the creation of a responsive and comprehensive MRP process, they want to heal and come together to reclaim their way of being now more than ever.

Appendix A: Summary of Solutions

Intergenerational impacts of colonization	
Short term solutions	• Federal legislation must include a retroactive clause to financially compensate Aboriginal women and their descendents who suffered a loss as a result of the *Indian Act* legislation • Membership and citizenship legislation and policies must be revised to provide choice for women and their descendents regarding band membership • The Aboriginal Healing Foundation and all Aboriginal healing and wellness programs must be expanded and adequately resourced to better address intergenerational impacts of colonization
Medium term solutions	• A mechanism is developed to implement compensation for the lack of protections for women and their descendants including disenfranchisement from First Nation communities and loss of languages, cultures and identities as a result of MRP • Gender based impact analysis of the Aboriginal Healing Foundation and healing and wellness programs be resourced for improved effectiveness for Aboriginal women, children and families • Repatriation programs are developed and resourced for communities to embrace their members
Long term solutions	• Break the cycle of intergenerational impacts of colonization and create the space to re-instill pride in Aboriginal identity and improve self-esteem • Women and their descendants will gain redress for the lack of protections of their rights that they experienced under the *Indian Act*

Violence	
Short term solutions	• NWAC is provided with resources to develop an effective national strategy to stop violence against Aboriginal women, children and families that contributes to matrimonial breakdown • Implement enforcement orders • Increased transitional housing for women, children and families • Formalize and recognize the role of Aboriginal women's organizations as an official stakeholder in policy and program design and initiatives.
Medium term solutions	• Subsidized and affordable housing be provided in a safe and healthy communities • Impact assessment to evaluate the impacts and gaps of existing programs and services which address violence, including shelters and transition houses and to provide additional resources where needed. • Investigate promising practices for developing healthy communities • Provide transitional housing for men
Long term solutions	• Violence is unacceptable • Communities utilize a collective culturally-relevant approach to resolving conflict • Implement or expand the application of promising practices for developing healthy communities

Justice	
Short term solutions	• Improve access for Aboriginal women to judicial processes which should take into consideration the unique needs of semi-remote, remote and isolated communities • The justice system must enforce court orders, Band bylaws, etc. • Development of multi-staged systems of Aboriginal mediation or other appropriate Aboriginal systems and practices for justice/decision making under MRP • Assessment and evaluation of the impact of MRP measures implemented under *First Nations Land Management Act* (FNLMA)
Medium term solutions	• That legal professionals and the justice system receive training regarding on reserve Aboriginal rights issues
Long term solutions	• Implementation of a community-based, culturally appropriate Aboriginal conflict or dispute resolution by First Nation communities

Accessibility of supports	
Short term solutions	• Increase the funding of programs to support Aboriginal women and children to prepare them for healthy relationships and to support them during the breakdown of matrimonial relationships • Ensure that Aboriginal women can access programs and supports both on and off reserve, including those living in semi-remote, remote, and isolated communities
Medium term solutions	• Develop a mechanism to provide a continuum of services for transitional ongoing support for Aboriginal women and children
Long term solutions	• Aboriginal women and children are able to access their benefits under the *Indian Act* regardless of their residency.

Communication and education	
Short term solutions	• Develop, implement, and resource an ongoing facilitation and communication process to increase the understanding of Aboriginal women and communities on MRP rights, policies, and processes.
Medium term solutions	• Establish mandatory federal/provincial/territorial policies for funding and implementation of Aboriginal Studies curriculum • Provide additional resources for education and upgrading training to increase employability of Aboriginal women to enable them to rebuild their families, communities and nations including the need to change eligibility requirements such as restrictive funding age limits. • Create a special fund/program specifically for women following marriage breakdown for education, training, economic development, and small business development with no eligibility barriers
Long term solutions	• Individuals, families, communities, and nations will have resources and rights-based knowledge to build healthy, viable and sustainable communities

Legislative change	
Short term solutions	• Implement overarching substantive federal legislation to protect the rights of women and children living on reserve in the interim until First Nation communities can develop their own laws: this legislation should include opt-out and compensation clauses.
Medium term solutions	• An enabling body consisting of Aboriginal women and First Nations representatives should facilitate a consultation and development process based on Indigenous law approaches for the resolution of MRP that is appropriate to each First Nation.
Long term solutions	• Communities utilize Indigenous law, which includes equal participation of women, to resolve MRP issues. • Communities will use this expertise to approach all decision making in the community

Appendix B: Glossary of Terms

Aboriginal Healing Foundation
The Aboriginal Healing Foundation encourages and supports Aboriginal people in building and reinforcing sustainable healing processes that address the legacy of physical abuse and sexual abuse in the residential school system, including intergenerational impacts. It facilitates the healing process by providing resources for healing initiatives, promoting awareness of healing issues and needs, and by nurturing a supportive public environment.

***First Nations Land Management Act* (FNLMA)**
The *First Nations Land Management Act* was passed by the federal government in 1999. It provides signatory First Nations with the opportunity to opt out of the land administration sections of the *Indian Act* and to establish their own regimes to manage their lands and resources. Under this process, a participating First Nation will develop a land code that sets out the basic rules for the land regime, which may include environmental management and protection laws. Within twelve months from the date the land code comes into effect, the First Nation must establish a community process to develop rules and procedures to deal with matrimonial property that do not discriminate on the basis of gender.[2]

Matrimonial Real Property (MRP)
This term refers to a couple's home or land that they live on, or benefit from, during their marriage or marital relationship. The key characteristic of this property is that it cannot be moved or easily physically divided between the spouses, unlike other types of property such as funds in a bank account or family furniture.

Transition Houses
Transition houses provide up to 30 days of temporary, safe, supported shelter to women and their children experiencing domestic violence in their lives. Transition houses may provide some combination of the following services: child care, parenting support, shelter, crisis intervention and counseling, transportation, outreach and accompaniment to appointments or to court.

[2] INAC Backgrounder First Nations Land Management Initiative, 2003.

Appendix C

Historical Timeline

Historical Timeline

Prior to Colonization

- First Nations cultural norms, kinship systems and laws determine outcomes of marriage breakdown
- Matriarchal kinship systems and egalitarian values were common

Colonial Period

- Pre-Confederation period - Treaty relationships entered into in regions such as the Maritimes & Ontario
- Colonial 'Indian' legislation – first attempt to impose foreign kinship rules that discriminated against First Nation women
- Laws and policies disrupted matriarchal and egalitarian First Nation cultural values and negatively affecting relations between men and women affecting many
- Notion of individual property rights and male-domination in property and civil rights introduced by colonial governments in efforts to assimilate First Nation people and with the hopes of ultimately eliminating reserves altogether

Post Confederation Indian Legislation

- Treaty process continues in West
- Federal Indian law attempted to impose a uniform land regime and acted as a vehicle to continue colonial policy of assimilation
- An amendment in 1869 authorized the Superintendent General of Indian Affairs to allocate reserve lands to individual Indians that would remain reserve lands. The requirement for a band council to allocate land with the approval of the Superintendent General was not put in place until an amendment of the *Indian Act* in 1880.
- *Indian Act, 1876* introduced gender-based discrimination in the Act's kinship rules for determining Indian status and band membership;
- Location tickets were issued, for lands in lawful possession of an Indian under the *Indian Act* as well as for lands allotted for enfranchisement purposes
- Location tickets replaced by Certificate of Possession system
- First Nation women not permitted to vote in band council elections
- Gender-based discrimination in wills and estates law
- Throughout this period, the notion of equality rights did not exist in Canadian law and women on and off reserve had very few legal protections for matrimonial property; and were at a significant legal disadvantage compared to men
- *Indian Act* does not address matrimonial property rights

Post World War II

- The beginning of human rights legislation in Canada (provincial and federal) following international developments in this area
- The valued role of First Nation war veterans was a motivating factor in beginning the gradual removal of legislated discrimination against First Nation people under federal and provincial laws
- First Nations women gain the right to vote in *Indian Act* band council elections by a 1951 amendment
- First Nation people acquire right to vote in federal elections in 1960
- No matrimonial property legislation off reserve to address the legal disadvantage of women off reserve until the 1970's
- *Indian Act* does not address matrimonial property rights and maintains explicit gender–based discrimination in relation to Indian status and band membership

1970's

- Joint NIB-Cabinet Committee fails to reach agreement on an approach to reform *Indian Act*
- Divisive debate within First Nation community over protection of individual and collective rights such as *Lavelle* challenging sex discrimination under *Indian Act* reach the Supreme Court
- *Canadian Human Rights Act* passed with an exemption for decisions and bylaws made under authority of the *Indian Act*
- High profile cases focusing on the interests of women working alongside their husbands in farm situations off reserve brought attention to the need for matrimonial property legislation off reserve; recognition that courts did not have the tools to fairly recognize the interests of both spouses upon marriage breakdown
- Provinces and territories enact legislation in the 1970's to provide matrimonial property rights during marriage and upon marriage breakdown

1980's

- First Nation women begin to seek matrimonial property legal protections using the new rights and protections available under provincial laws
- *Indian Act* still silent on the question
- Constitutional reform discussions lead to enactment of section 35 of the *Constitution Act, 1982*, and *Canadian Charter of Rights and Freedoms* to guarantee individual human rights with special mention of gender equality and a reference to aboriginal and treaty rights and a specific guarantee of equality for men and women in the enjoyment of aboriginal and treaty rights
- In 1985, amendments to the *Indian Act* were made to remove explicit sex discrimination affecting First Nation women; amendments also added a new restriction on recognition of Indian status that is now the subject of much concern as a divisive element for First Nation families

1986

- Two cases concerning the extent to which provincial laws on matrimonial property may be applied to individual interests in reserve lands reach the Supreme Court of Canada– *Derrickson* v *Derrickson* and *Paul* v *Paul*
- The Supreme Court decided that provincial laws cannot apply in any way that would change any individual property interest a First Nation person may hold under the *Indian Act*
- In *Derrickson*, the court also said provincial laws relating matrimonial property can apply of their own force (without incorporating them in a federal law) to interests in reserve lands so long as individual real property interests under the Indian Act are not changed – for example, provincial laws can be used to issue a compensation order requiring one spouse to pay another in order to divide properly equally – these orders can take into account the value of home located on land held by certificate of possession
- Silence of the *Indian Act* and the non-recognition of First Nation jurisdiction on the matter means many basic protections not available to male or female spouses on reserves; women are particularly negatively impacted by the legislative gap because they still are more often the primary caregivers of young children

1990's to present

- Several commissions of inquiry in Canada draw attention to the issue and the need for some action including the Manitoba Aboriginal Justice Inquiry, the Royal Commission on Aboriginal Peoples, Final Report from the Commission on First Nations and Métis Peoples and Justice Reform
- Eight UN human rights bodies express concern about the issue of matrimonial real property on reserves
- Litigation on lack of protection for matrimonial real property rights is launched by First Nation women organizations
- In 2003, the Senate Standing Committee on Human Rights issued its first report calling for legislative action on the question, consultations with First Nations and First Nation organizations;
- In 2005, the House of Commons Aboriginal Affairs Committee issued a report calling for legislative action on the question and recognized the inherent rights of First Nations respecting matrimonial real property
- In 2006, the House of Commons Standing Committee on the Status of Women takes up the issue matrimonial real property on reserves and continues to monitor it

Fall of 2005

- The federal government tabled its response to the various committee reports indicating its intention to seek authority to consult on matrimonial real property

June 2006

- The Minister of Indian Affairs and Northern Development seeks and receives authority to consult with First Nations and First Nation organizations in June 2006 and announces the current process as well as appointment of a Ministerial Representative to assist the government and First Nations to explore legislative and non-legislative options

Appendix D

Topical Listing of Selected Indian Act Provisions

20 February 2007

Topical Listing of Selected Indian Act Provisions

Protection of Collective Interests of First Nations in their Reserve Lands

2.(1) In this Act,

"**band**" means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
(b) for whose use and benefit in common, moneys are held by Her Majesty, or
(c) declared by the Governor in Council to be a band for the purposes of this Act;

"**reserve**"
(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
(b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;

2. (2) The expression "band", with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

16. (2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

25. (2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

28. (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

29. Reserve lands are not subject to seizure under legal process.

30. A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(a) unlawfully in occupation or possession of,

(b) claiming adversely the right to occupation or possession of, or

(c) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

31. (2) An information exhibited under subsection (1) shall, for all purposes of the Federal Courts Act, be deemed to be a proceeding by the Crown within the meaning of that Act.

31. (3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

35 (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

35 (3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

35 (4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

37. (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

38. (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

39. (1) An absolute surrender or a designation is void unless

(a) it is made to Her Majesty;
(b) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,
(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or
(iii) by a referendum as provided in the regulations; and

(c) it is accepted by the Governor in Council.

46. (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that ….

> (d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

58. (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

> (a) improve or cultivate that land and employ persons therefor, and authorize and direct the expenditure of such amount of the capital funds of the band as he considers necessary for that improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;
> (b) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and
> (c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

58. (2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

> ……..
> (i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefore has been granted under section 60;
>
> (p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
>
> (p.1) the residence of band members and other persons on the reserve;
>
> (p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

<u>Individual Interests in Property (real and personal)</u>

2.(1) In this Act,

"**estate**" includes real and personal property and any interest in land;

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) and 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(g) and (h), subsection 74(4), section 84, paragraph 87(1) (a), section 88, subsection 89(1) and paragraph 107(b).

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

20. (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

20. (3) For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

20. (4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

20. (5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

20. (6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force
(a) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or
(b) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

22. 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. 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.

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

25 (2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

26. Whenever a Certificate of Possession or Occupation or a Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.

27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

28. (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

DESCENT OF PROPERTY

Powers of Minister with respect to property of deceased Indians

42. (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

Regulations

(2) The Governor in Council may make regulations providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

Application of regulations

(3) Regulations made under subsection (2) may be made applicable to estates of Indians who died before, on or after September 4, 1951.

Particular powers

43. Without restricting the generality of section 42, the Minister may

(a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;
(b) authorize executors to carry out the terms of the wills of deceased Indians;
(c) authorize administrators to administer the property of Indians who die intestate;
(d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and
(e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

Courts may exercise jurisdiction with consent of Minister

44. (1) The court that would have jurisdiction if a deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the jurisdiction and authority conferred on the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

Minister may refer a matter to the court

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration of a deceased shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to that court any question arising out of any will or the administration of any estate.

Orders relating to lands

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

WILLS

Indians may make wills

45. (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

Form of will

(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Probate

(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

Minister may declare will void

46. (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

(a) the will was executed under duress or undue influence;
(b) the testator at the time of execution of the will lacked testamentary capacity;
(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;
(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;
(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or
(f) the terms of the will are against the public interest.

Where will declared void

(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

DISTRIBUTION OF PROPERTY ON INTESTACY

Surviving spouse's share

48. (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

Idem

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

(a) if the intestate left no issue, the remainder shall go to the widow,
(b) if the intestate left one child, one-half of the remainder shall go to the widow, and
(c) if the intestate left more than one child, one-third of the remainder shall go to the widow,

and where a child has died leaving issue and that issue is alive at the date of the intestate's death, the widow shall take the same share of the estate as if the child had been living at that date.

Where children not provided for

(3) Notwithstanding subsections (1) and (2),

(a) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the survivor shall go to the children; and
(b) the Minister may direct that the survivor shall have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.

Distribution to issue

(4) Where an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the survivor, if any, per stirpes among such issue.

Distribution to parents

(5) Where an intestate dies leaving no survivor or issue, the estate shall go to the parents of the deceased in equal shares if both are living, but if either of them is dead the estate shall go to the surviving parent.

Distribution to brothers, sisters and their issue

(6) Where an intestate dies leaving no survivor or issue or father or mother, his estate shall be distributed among his brothers and sisters in equal shares, and where any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

Next-of-kin

(7) Where an intestate dies leaving no survivor, issue, father, mother, brother or sister, and no children of any deceased brother or sister, his estate shall go to his next-of-kin.

Distribution among next-of-kin

(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

Degrees of kindred

(9) For the purposes of this section, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

Descendants and relatives born after intestate's death

(10) Descendants and relatives of an intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

Estate not disposed of by will

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

No community of property

(12) There is no community of real or personal property situated in a reserve.

Equal application to men and women

(15) This section applies in respect of an intestate woman as it applies in respect of an intestate man.

49. A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister.

50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

50. (2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

50. (3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

50. (4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

58. (3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

Other Misc. Property Provisions

68. Where the Minister is satisfied that an Indian

(a) has deserted his spouse or common-law partner or family without sufficient cause,
(b) has conducted himself in such a manner as to justify the refusal of his spouse or common-law partner or family to live with him, or
(c) has been separated by imprisonment from his spouse or common- law partner and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or common-law partner or family or both the spouse or common-law partner and family of that Indian.

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

89. (1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

89 (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Residency

4 (3) Sections 114 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

18.1 A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody.

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely, ……..

(p.1) the residence of band members and other persons on the reserve;

(p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

Spouses

2.(1) In this Act,

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"survivor", in relation to a deceased individual, means their surviving spouse or common-law partner.

Appendix E

Information on First Nations Land Management Act

List I : First Nations Clients by Legislative initiative

First Nations Land Management Act (FNLMA)

Operational First Nations under the FNLMA, which are managing their lands and resources under their own land code, are:

1. Beecher Bay (BC)
2. Dakota Whitecap (SK)
3. Georgina Island (ON)
4. Kinistin (SK)
5. Kitselas (BC)
6. L'heidli T'ennah (BC)
7. McLeod Lake (BC)
8. Muskeg Lake (SK)
9. Muskoday (SK)
10. Nipissing (ON)
11. Opaskwayak Cree Nation (MB)
12. Scugog Island (ON)
13. Sliammon (BC)
14. Ts'kw'aylaxw (BC)
15. Tsawwassen (BC)
16. T'souke (BC)
17. Westbank (Self-Gov) (BC)
18. Shxwha;y Village (BC)

The ***Developmental First Nations***, which are developing their land code and preparing for a community ratification vote, are:

1. Chippewas of Kettle and Stoney Pt (ON)
2. Cowessess (SK)
3. Dokis (ON)
4. Flying Dust (SK)
5. Fort McKay (AB)
6. Garden River (ON)
7. Henvey Inlet (ON)
8. Kingsclear (NB)
9. Leq'a:mel First Nation (BC)
10. Matsqui (BC)
11. Mississauga #8 (ON)
12. Mnjikaning (ON)
13. Moose Deer Pt (ON)
14. Musqueam (BC)
15. Norway House (MB)
16. Osoyoss (BC)
17. Pasqua (SK)
18. Sea Bird Island (BC)
19. Songhees (BC)

20. Squamish (BC)
21. Squiala (BC)
22. Swan Lake (MB)
23. Tsawout (BC)
24. Tsleil-Waututh (Burrard) (BC)
25. Tzeachten (BC)
26. We We Kai (Cape Mudge) (BC)
27. Whitefish Lake (ON)
28. Chemawawin (MB)
29. Big Island (ON)
30. Essipit (QC)

As of July 2006, the following First Nations have requested that they be considered for addition to the developmental group:

1. Malahat (BC)
2. Campbell River (BC)
3. Nanoose (BC)
4. Skawahlook (BC)
5. Popkum (BC)
6. Soowahlie (BC)
7. Sumas (BC)
8. Chawathil (BC)
9. Aitchelitz (BC)
10. Yakweakwioose (BC)
11. Cheam (BC)
12. Skowkale (BC)
13. Shaw'ow'hamel (BC)
14. Skwah (BC)
15. Kwaw Kwaw Aplit (BC)
16. Scowlitz (BC)
17. Moricetown (BC)
18. Kwantlen (BC)
19. Nee Tahi Buhn (BC)
20. Shuswap (BC)
21. Tla-o-qui-aht (BC)
22. Metlakatla (BC)
23. Fort Nelson (BC)
24. Williams Lake (BC)
25. Tsay Keh Dene (BC)
26. Stellat'en (BC)
27. Homalco (BC)
28. Alexander (AB)
29. Stoney (AB)
30. One Arrow (SK)
31. Yellow Quill (SK)
32. Peter Ballantyne (SK)
33. Peepeekisis (SK)
34. Kahkewistahaw (SK)

35. Mistawasis (SK)
36. Mosakahiken (MB)
37. Wuskwi Sipihk (MB)
38. Pine Creek (MB)
39. Mathias Colomb (MB)
40. Marcel Colomb (MB)
41. Sapotaweyak (MB)
42. Wasauksing (ON)
43. Onigaming (ON)
44. Nicickousem’g (ON)
45. Wauzhushk O. (ON)
46. NW Angle # 33 (ON)
47. Naotkamwanning (ON)
48. Big Grassy (ON)
49. Ochilchagwe’B. (ON)
50. Alderville (ON)
51. Temagami (ON)

Status of First Nation Land Management MRP Laws

Under subclause 5.4(d) of the Framework Agreement on First Nation Land Management (Framework Agreement), First Nations have a period of 12 months from the date the land code takes effect to enact its rules and procedures in relation to the breakdown of a marriage (also known as Matrimonial Real Property (MRP) laws. These rules and procedures shall be enacted in the First Nation's Land Code or First Nation Laws (Framework Agreement subclause 5.4(c).

First Nation	Date Land Code in Effect	Date MRP law enacted
Operational First Nations With MRP laws in place:		
Georgina Island	January 1, 2000	June 30, 2001
Scugog Island	July 1, 1999	January 1, 2000
Muskoday	July 1, 1999	June 30, 2001
Lheidli T'enneh	December 1, 2000	December 1, 2001
McLeod Lake	March 1, 2003	May 20, 2004
Beecher Bay	August 1, 2003	August 1, 2004
Whitecap Dakota	January 1, 2004	December 1, 2004
Ts'kawlaxw	May 1, 2004	November 21, 2005
Opaskwayak Cree Nation	August 1, 2002	February 15, 2006
Westbank (now fully self-governing)	July 1, 2003	February 20, 2006
Operational First Nations that are still within the one-year period		
Tsouke	February 2007	
Shx:way Village	January 2007	
As per s.5.4(d) of the Framework Agreement, Operational First Nations have 12 months from the date the land code takes effect to enact MRP laws. The following First Nations are beyond the one-year period.		
Nipissing	July 1, 2003	2 years 7 months overdue
Tsawwassen	December 16, 2003	2 years 2 months overdue
Sliammon	September 30, 2004	1 year 5 months overdue
Kinistin	February 1, 2005	1 year overdue
Muskeg Lake	August 1, 2005	1 year 6 months overdue
Kitselas	November 25, 2005	3 months overdue

Appendix F

2003 Report of the Auditor General
Exhibit 6.1
Differences between on-reserve and off-reserve housing

Exhibit 6.1

Differences between on-reserve and off-reserve housing

Dimension	On-reserve	Off-reserve
• **Ownership**	• Crown has title to land. • Collective possession of land and houses is most prevalent. • Individual possession is under the *Indian Act*.	• Land and houses are privately owned. • Collective possession of land and houses is rare.
• **Financing**	• *Indian Act* allows mortgage or seizure of land and property, in favour of, or by, an Indian or a band. • Access to private financing is limited; there is no collateral. • Government subsidies are critical. • Ministerial loan guarantee system is available but must be supported by the community.	• Land and property can be mortgaged and seized, within the legal framework. • Access to private financing is the norm. • Lending institutions specializing in property financing are involved. A complex financial system is used to ensure flow of funds and mitigate risks.
• **Legal rules governing housing, rent, occupancy, tenure, ownership, and responsibilities**	• Legal powers of band councils to define and enforce rules are imprecise. • Limited enforcement. • Not clear to what extent off-reserve legal framework is applicable.	• Covered under provincial laws. • Enforced by designated agencies and judicial system.
• **Housing supply**	• Many occupants do not consider it their responsibility to meet their housing needs. • Many occupants carry out little maintenance, repair, or renovation. • Access to building supplies and skilled labour is limited in isolated areas. • Application of codes and regulations is uncertain.	• Individuals are responsible for meeting their housing needs. • Occupants/owners buy or rent, maintain, repair, and renovate. • There is generally a good supply of material and labour. • Inspections ensure compliance with applicable codes and regulations.
• **Housing allocation**	• Chiefs and councils often decide on the number of constructions and renovations each year and their allocation. • Limited market for buying, selling, or renting houses.	• Individuals can buy, sell, and rent houses on local markets. • Private financial means is the main form of allocation.
Geographical considerations	• 65% of the population is in rural, remote, and special access areas.	• 80% of the population is in urban areas.

Appendix G

Legal Opinions

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March 6, 2007

Privileged and Confidential

Wendy Grant-John
Ministerial Representative
Matrimonial Real Property Issues on Reserves
Suite 1106, 155 Queen Street
Ottawa, Ontario
K1A 0H4

Dear Ms. Grant-John,

This is in response to your request for an analysis of the ways in which the range of real property interests on reserves would be impacted by key legislative options proposed during the current MRP process including the three proposed by the federal government. This analysis is to be from the viewpoint of a civil law jurisdiction, while taking into account First Nation jurisdiction and Aboriginal and treaty rights issues.

The three basic options have been set out as follows[1]:

Option 1: Incorporation of provincial and territorial matrimonial real property laws on reserves

Option 2: Incorporation of provincial and territorial matrimonial real property laws combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property

Option 3: Substantive federal matrimonial real property law combined with a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property.

Options 1 & 2 provide that the *Indian Act* will prevail in case of inconsistency or conflict. In

1 **Consultation Document: Matrimonial Real Property on Reserves**, Women's Issues and Gender Equality Directorate, Indian and Northern Affairs Canada, September 2006

addition, INAC has proposed that any solution must be[2]:

- in line with Canadian human rights;
- in line with constitutional law; and
- enforceable.

INAC has also stated that any solution should keep in mind matrimonial real property rights in the event of the death of a spouse.

Please note that the term "Indian" when used in this opinion is a reference to "Indian" as defined in the *Indian Act* and does not refer to the definition of the term "Indian" in ss. 91(24) of the *Constitution Act, 1867* or ss. 35(2) of the *Constitution Act, 1982*.

PART I – POTENTIAL OUTCOMES OF LEGISLATIVE OPTIONS

A. Synopsis of Quebec Law Relating to Matrimonial Real Property

This section presents only a brief and highly simplified outline of some of the most relevant aspects of the law in Quebec relating to matrimonial real property. It is certainly not a complete discussion of the subject; it only attempts to summarize a few of the more pertinent aspects of the law for the purposes of the discussion here.

1. General Rules

- Articles 414-415 of the Quebec Civil Code (hereinafter "QCC") provide that marriage automatically creates a "family patrimony" which is made up of certain property of the spouses regardless of which of them actually holds the right of ownership in that property. This family patrimony includes the residences of the family or the rights which confer the use of them (e.g. a lease). Note that all residences, including summer cottages, hunting camps etc. are part of family patrimony provided they are used by the family. A hunting camp used by only one spouse would not form part of the family patrimony. Only one residence would be the "family residence" (see below). The family patrimony also includes various other property including household furnishings, bank accounts, vehicles etc.

- Property, including a residence, acquired by one spouse through gift or inheritance before or during the marriage does not form part of the family patrimony.

- A civil union has the same effects. A civil union is one which is formally contracted

2 *ibid*

before an official who is competent to perform marriages. It is dissolved by the death of one of the spouses, by court judgment or by a joint declaration of the spouses before a notary.

- The same basic principles apply whether the marriage or civil union is terminated by divorce or by the death of one of the spouses.

- Where a couple is living in a *de facto* relationship – that is, simply living together without having entered into either a marriage or a civil union, no family patrimony is created and there is no protection in regard to the family residence. The only exception would be if the couple had signed a "cohabitation contract" dealing with the issue.

2. Special Rules Relating to the Family Residence

These rules apply to both marriages and civil unions. They do not apply to *de facto* relationships. The family residence is normally part of the family patrimony to be shared equally between the spouses. There are some exceptions such as where the house has been inherited by one of the spouses. In that case,

a) If the family residence is owned by one of the spouses

- a declaration that the house is a family residence may be filed in the Quebec Registry System by either spouse without the consent of the other. The purpose of registration is to provide notice to third parties that the owner cannot sell, rent or hypothecate (essentially means "mortgage") the residence without the written consent of the other spouse.

- in case of separation, divorce, dissolution or nullity of the marriage, the court may award the right of use of the family residence to the spouse to whom it awards custody of a child.

b) If the family residence is leased by one of the spouses

- either spouse, without the consent of the other, can advise the landlord by letter that the residence is a family residence;

- the spouse who leased the premises cannot sublet, cede or end the lease without the consent of the other spouse;

- in case of separation or divorce the court may award to the spouse of the lessee, the lease of the family residence;

- the award binds the lessor once it is served on him and relieves the original lessee of the rights and obligations under the lease from that time forward.

3. Rules Relating to Partition of the Family Patrimony

- partition is triggered by separation, divorce, annulment of the marriage or the death of one of the spouses.

- the same rules apply to civil unions

- a spouse may not renounce his/her rights to the family patrimony other by formal notarial deed which must then be registered;

- partition is made on the basis of the net value of the assets taking into account the debts contracted for the acquisition of the assets. and is divided equally between the spouses.

4. Marriage Regimes

- unless otherwise provided for in a marriage contract, spouses are governed by a regime of partnership of acquests;

- the property that each of them possesses at the time of the marriage or civil union remains their private property;

- the net value of the property that is acquired during the marriage is divided equally between the spouses;

- there is a series of rules governing how value is established, compensatory payments etc.

5. Formalities Required

- the acquisition, creation, recognition, modification, transmission or extinction of an immoveable real right requires registration in the Quebec Land Registry. The lands must be surveyed. The documents must be drawn up by a notary who keeps a special register of these documents.

B. *INDIAN ACT* PROVISIONS

1. Rights to Land and Houses on Reserve

a) the general regime

Under the *Indian Act* (the "Act") a land management regime is set up in which the ultimate control of most transactions lies with the Minister. The most obvious statement of this principle is at s. 20:

> **20.** (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Subsections 20(5) and (6) deal with issuance of a temporary Certificate of Occupation by the Minister where the Minister has not approved the allotment by the council of the band.

Section 23 provides that an Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may be paid the amount of compensation, if any, determined by the Minister, either by the person who goes obtains possession or from the funds of the band, at the discretion of the Minister.

Section 24 provides that any transfer of a right of possession of land from one Indian to another is not valid unless approved by the Minister.

Section 25 provides that when an Indian ceases to be entitled to reside on a reserve, he may transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession. If he does not transfer it, the right reverts to the band subject to such payment of compensation for permanent improvements as the Minister may decide.

b) descent of property

Section 44 provides that the Minister may consent to have the court that would have jurisdiction if a deceased were not an Indian exercise the Minister's jurisdiction, in accordance with the *Act*, in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court. The Minster may also direct that an application for probate be made to the court and the Minister may refer to that court any question arising out of any will or the administration of any estate.

However, even where a court is exercising jurisdiction or authority with the Minister's consent under section 44, it cannot, without the consent in writing of the Minister, enforce any order relating to real property on a reserve.

Section 48 deals with *intestate* successions. It provides that estates with a value of less than $75,000 go to the surviving spouse. If more than $75,000, the *Act* determines the heirs.

Section 48(3) provides that the Minister may direct that the surviving spouse will have the right to occupy any lands in the reserve that were occupied by the deceased at the time of death. Note that there does not seem to be any restriction in terms of whether or not the survivor is a band member or would otherwise have a right to reside on the reserve.

Sub-section 48(12) states specifically that there is no community of real or personal property situated in a reserve.

c) residency rights

- a non-member spouse does not necessarily have a right to reside on the reserve, particularly if the marriage has been dissolved by death or divorce;

- non-member children may have no right to reside on reserve; however a member who lives on reserve may live there with his/her dependent children;

- a person who has no right to reside on reserve cannot acquire such a right by inheritance. He/she may inherit real property, but it must be sold. If there is no purchaser, the right reverts to the band subject to such compensation, if any, as the Minister may decide. Note the comment made at b) above concerning a directive made by the Minister in virtue of s. 48(3) allowing a surviving spouse to occupy land;

- The council of a band may make by-laws in regard to the residence of band members and other persons on the reserve.

C. FACTUAL CONTEXT OF ISSUES RELATED TO MRP ON RESERVES

In seeking a remedy to the difficulties caused by the current lack of applicable law to MRP on reserve, care must be taken not to create a system which has little practical relevance to the issue or one which causes further confusion and uncertainty. The factual context of MRP issues must be taken into account if legal recourses are not to be illusory. For example:

- much of the existing occupation of land on reserves is on the basis of “custom” allotments, i.e. allotments which have not been recognized by the courts as legal under the *Indian Act*;

- historically, allotments to women represented a very small minority of land allocations[3];

- many of the marriages on reserve are *de facto* marriages;

3 Decontie, Bob: “Paper on Reserve Land Allotment and Possession”, May 19, 2004

- most successions are intestate;

- more people live in some form of rental housing or public housing than in owner-occupied housing;

- reserves in Quebec do not form part of the Land Registry system which exists elsewhere in the province .

D. POTENTIAL IMPACT ON RIGHTS UNDER THE *INDIAN ACT*

1. Rights to be Considered

To date, there has been no recognition by the courts of "custom" allocations of rights to use or occupy lands in an Indian reserve under the *Indian Act*. The case law has been very clear that the provisions of s. 20 of the *Act* trump all other considerations.

> a) It is clear to me that the respondent could not seek a judicial declaration that he was "legally entitled to possession" of the land on the sole basis that there had been an agreement in 1942 between the respondent and Henry and Lizzie Smith whereby, for the sum of $1,100.00, the respondent had supposedly "purchased" a certain piece of land in the reserve **and that his interest in that land had been acknowledged by members of the Band until 1982.**
>
> The legal status of Indian reserve lands is based on the provisions of the Indian Act. While the legal title to those lands vests in Her Majesty the Queen, the use and benefit thereof vests in common in all the members of the Band for which the reserve has been set apart. There is a possibility of acquisition by the Band member of the right of exclusive possession and use of individual parcels of reserve land, but that acquisition is strictly governed by the Indian Act.
>
> *Cooper v. Tsartlip Indian Band* [1996] F.C.J. No. 826 (F.C.A.), par. 9-10 (emphasis added)

Some courts have suggested that to recognize customary uses of the land in a reserve contrary to the Act would breach the band council's fiduciary duty to the band members:

> The recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the Act. Such an approach to governance by a band council would be adverse to its fiduciary duty to manage reserve lands in the best interests of all band members. As stated by Rae J. at page 330 [B.C.L.R.; p. 64 C.N.L.R.] in Leonard v. Gottfriedson, supra:
>
> > "It should be apparent that the chief and councillors of a band are in a position of trust relative to the interests of the band generally, the band's assets and the members of the band."
>
> *Lower Nicola Band v. Trans-Canada Displays Ltd.* [2004] 4 C.N.L.R. 185, par. 151, (B.C.S.C.); See also *Johnstone v. Mistawasis First Nation* [2003] 3 C.N.L.R. 117 (S.Q.B.)

The individual possessory right, if properly allocated and approved, has been described as follows:

> … I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands which right is given by statute to the entire Band in common but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown. Brick Cartage Limited v. Her Majesty the Queen [1965] Ex.C.R. 102. In the absence of such allotment by the Band Council there is no statutory provision enabling the individual Band member alone to exercise through possession the right of use and benefit which is held in common for all Band members.
>
> *Squamish Indian Band v. Findlay* [1981] B.C.J. No. 366, par. 9 (B.C.C.A.)

Given the present state of the law, this opinion will consider only those rights which are recognized as valid under the Act.

Briefly stated, lands in a reserve cannot be owned by anyone other than the Crown. Individual rights to allotments may be granted by the council of a band and must be approved by the Minister. The documents which attest to a valid right of use and occupation have been known under various names from time to time (e.g. "certificate of possession", "location ticket" etc.). Some may have certain conditions attached to them (such as a certificate of occupation which is limited to a maximum period of 2 years), but the nature of the right i.e. "lawful possession" remains essentially the same. Unless otherwise indicated, such rights usually are for an indefinite period of time and cannot be rescinded unless there is a major defect in the process or there has been fraud. They usually can be transferred to another band member as long as the transfer is approved by the Minister.

On the other hand, housing can be owned by individuals. Although most people on reserves still live in housing which they either rent under some form of lease, or in which they have a right of use and occupation as a result of having had it allocated to them by the band council (as in "social housing"), there has been a gradual move towards private ownership of housing. Note that in Quebec, it is possible for a person to own a building on land which is owned by another person through a right of "superficie". This format is made possible in Cree and Naskapi communities under the *Cree/Naskapi (of Quebec) Act*.[4]

2. Potential Outcomes of Options 1 & 2

Options 1 & 2 both involve the incorporation of provincial and territorial matrimonial real property laws and their application to matrimonial real property on reserves situated in the respective provinces and territories. These options further suggest that in the event of an inconsistency or conflict between the provisions of the *Indian Act* and the applicable provincial law, the *Indian Act* would prevail.

4. S.C. 1983-84, c. 18

Option 2 includes the addition of a legislative mechanism granting authority to First Nations to exercise jurisdiction over matrimonial real property. Since the first part of both options is the same, the following comments apply to both.

The incorporation of Quebec law relating to matrimonial real property, with the *Indian Act* or incorporating legislation prevailing in case of inconsistency or conflict with the provincial legislation would result in the following:

a) Formation of Family Patrimony

In the case of marriage or a civil union (not a *de facto* or "common-law" marriage), family patrimony will be formed through the application of Quebec law. The term "residences of the family or the rights which confer the use of them" in article 415 QCC is broad enough to include Certificates of Possession, occupation permits or other rights to land issued under the *Indian Act*.

On its own, art. 415 QCC would also likely be sufficiently broad to include the right to use and occupy a house granted by the Band Council or otherwise officially sanctioned. However, at least some courts to date have tended to associate the use of a house with the use of land and, where there has been no official allocation of land under s. 20 of the *Indian Act*, they have not recognized a right of occupancy of a house[5]. In this situation, if the *Indian Act* prevails, there would be no valid "rights conferring the use" and the house would not be part of the family patrimony. This would defeat much of the purpose of adopting the legislation.

b) The Family Residence

If the family residence is owned by one of the spouses, the declaration that the house is a family residence cannot be filed in the Quebec Registry System because reserves do not form part of the land registry system in Quebec. In the absence of this registration, these protections will not exist.

In case of separation, divorce, dissolution or nullity of the marriage, the value of the family residence would normally be divided equally between the spouses. In addition, the court may award the right of use of the family residence owned by one of the spouses to the spouse to whom it awards custody of a child (art. 410 QCC). However, this is in direct conflict with the *Indian Act* which provides that no one may be in possession of land in a reserve unless it has been allocated by the band council and approved by the Minister (s. 20). Unless the Act is amended, this will prevail, In any event, court orders may not be enforceable because reserve lands are not subject to seizure under legal process (s. 29).

The Civil Code provides that where the family residence is leased by one of the spouses, either spouse, without the consent of the other, can advise the landlord by letter that the

5 *MacMillan v. Augustine*, [2004] 3 C.N.L.R. 170 (N.B.Q.B.)

residence is a family residence. If this is done, the spouse who leased the premises cannot sublet, cede or end the lease without the consent of the other spouse. This is another potential conflict because the Act provides that the transfer can take place if the Minister approves, with or without the consent of the spouse.

In case of separation or divorce, the court may award to the spouse of the lessee, the lease of the family residence. The award binds the lessor once it is served on him and relieves the original lessee of the rights and obligations under the lease from that time forward. However, under the *Indian Act*, transfer of these rights is subject to the consent of the Minister. The transfer can only be made to the band or another member of the band.

c) Partition of the Family Patrimony

Partition may be triggered by separation, dissolution (by divorce or the death of one of the spouses) or nullity of a marriage. The same rules apply to a civil union, but not to a *de facto* marriage. Partition entails the equal division of the family patrimony between the spouses.

As a reminder, the family patrimony includes secondary residences such as summer cottages and hunting camps, not just the family residence.

The same problems exist for the partition of the rest of the family patrimony as for the family residence. In particular, in regard to successions, the *Indian Act* (s. 48(12)) specifies that there is no community of real or personal property situated in a reserve. Without some form of community of property, the notion of family patrimony is illusory. If this prevails, it would defeat the whole purpose of adopting the provincial legislation.

Partition is made on the basis of the value of all assets in the family patrimony. These include more than just real estate; they include furnishings in the home, vehicles, money, certain types of pension benefits etc.. There is a system of compensatory payments which may be made as well. In order to be able to partition the assets and determine any compensatory payments, the court must be able to ascertain the value of all the assets – not just the real estate.

It will be extremely difficult to arrive at a fair partition of family assets if one forum deals with real property and another, different one, deals with all the other assets.

The ability of a court to make any order regarding matrimonial real property will depend on the extent to which the initial allocation of the land and/or housing is considered to have been valid. As we have seen, “custom” allotments have yet to be recognized as valid and it is conceivable that many of these allotments will be considered as reverting to the band, rather than being part of the family patrimony.

d) Residency Rights

A further difficulty in the application of provincial law to MRP on reserves is the issue of residency rights. Non-member spouses, who may be "Indians" (within the meaning of the *Indian Act*) from other reserves or individuals who do not meet the definition of "Indian" in the *Act*, may not have a right to reside on the reserve on which the family patrimony is situated, particularly if the marriage has been dissolved.

The reality is that many families living on reserve have few assets and are dependent upon some form of social housing. Under provincial law a court may order that the spouse who has custody of the children may continue to live in the family residence, but if that spouse has no right to reside on the reserve, he/she will be required to take the children and leave the community with little or nothing in the way of compensation or support. The recourses provided for in Quebec law will not be adequate to allow for continued residence for the spouse and the children in the family home if the *Indian Act* prevails.

3. Potential Outcome of Option #3

It is difficult to comment on the potential outcome of Option #3 as the content of the possible substantive federal matrimonial real property law is unknown at this stage. Nonetheless, some possible advantages of such legislation can be foreseen.

One such advantage would be that substantive legislation could enact a complete and coherent code whereas Options 1 & 2 run the risk of creating a patchwork caused by the fact that only those parts of the provincial or territorial law which were not in conflict or inconsistent with the *Indian Act* would be applicable on reserve.

Another advantage would be that the law would be uniform for all Indians on reserves across Canada. Under Options 1 & 2, there would be considerable differences in treatment of certain individuals. For example, in some provinces, *de facto* or "common-law" marriages are recognized for the purposes of protection of the family home and other assets. In other provinces, such as Quebec, they are not. The inequality of treatment could not be saved by the argument that individuals would be treated equally on and off reserve within the same province because, as we have seen, not all provincial law would be applicable on reserve given that the *Indian Act* would prevail in case of conflict or inconsistency.

A third potential advantage would be that difficulties arising out of conflicts of laws where the family patrimony is situated on reserves in two different provinces may be more easily resolved, and courts would have a coherent set of rules to apply in case of partition.

Where provision is made for First Nations' jurisdiction, and some First Nations enact laws on MRP, substantive federal legislation could also be used to supplement, or fill gaps in, First Nation laws where such laws may not have provided for a particular situation.

PART II – ISSUES RELATED TO CONSULTATION

A legal opinion was also requested respecting key consultation issues that have arisen during the current MRP process. Briefly stated, these included:

a) Is there a legal duty to consult with First Nations in considering federal legislative options that would affect real property interests on reserves subject to the *Indian Act* land regime provisions?

b) Are there duties with different content in regard to real property interests on reserves in terms of how to discharge the Crown's duty?

c) If there are distinct legal duties to consult with individual First Nations, are there any implications for the manner in which a consultation on matrimonial real property issues is to be carried out?

d) Once the federal Cabinet has determined what legislative proposal it recommends be developed into a Bill, is there a legal duty to consult on that specific proposal with each First Nation subject to the *Indian Act* land regime?

1. Is There a Duty to Consult First Nations in Regard to Legislation on Matrimonial Real Property?

The duty to consult is grounded in the honour of the Crown.

> *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511. par. 16-18

The duty to consult is triggered at a low level.

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. **The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.** At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43).
>
> *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, par. 34 (emphasis added)

In regard to legislation affecting matrimonial real property on reserve, there are two main areas which "might be adversely affected" – the First Nations' interests in their lands and their inherent right of self-government under s. 35(1) of the *Constitution Act, 1982.* In the case of reserve lands, the Crown certainly has notice of the Indian interest in those lands.

A Band acquires a legal interest in reserve lands once the reserve is created even if the reserve is created on non-s. 35(1) lands. Thus, a duty to consult can be said to arise in regard to interference with reserve lands regardless of the legal basis for the formation of the reserve.

> *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245, par. 98

The interest of an Indian Band in reserve lands is the same as aboriginal title in tribal lands.

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. . . .
>
> *Guerin v. Canada* [1984] 2 S.C.R. 335 at p. 379; *Paul v. Canadian Pacific Ltd.*: [1988] 2 S.C.R. 654, par. 32; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, par. 120; *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245, par. 77

Lamer, C.J., in elaborating on the nature of the duty to consult in the context of aboriginal title, seems to have considered it simply as an adjunct to the proprietary interest in land, not a separate self-government right:

> […] First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. […] This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands**. There is always a duty of consultation**. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin.
>
> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, par. 168 (emphasis added)

In regard to the inherent right of self-government, Professor Kent McNeil has interpreted some of Lamer, C.J.'s comments at par. 115 in *Delgamuukw* as potentially supportive of an inherent right to self-government. At that paragraph, the Chief Justice stated:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.
>
> *Delgamuukw*, *supra*, par. 115. See Kent McNeil: *Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government*, (2003) 22 Windsor Y.B. Access Just. 329

Professor McNeil's comments were made in the context of amendments to the *Indian Act* sections on governance and by-law powers and not in the context of infringements of rights

to land. He points out that the burden of proof in an assertion of a right of self-government is on the First Nation asserting it.

The assertion of a broad right to manage the use of reserve lands has been declared by the Supreme Court of Canada to be excessively general.[6] It would therefore seem that a First Nation would have to assert and prove a more specific right of self-government in the nature of a right to regulate the possession of matrimonial property or perhaps the right to regulate domestic arrangements more generally.

This avenue is more problematic in terms of triggering a duty to consult. It is not clear that the Crown could be said to have notice of this type of right unless the specific First Nation asserting the right were to give the Crown notice. Even then, the Crown could contest it, and the question would likely to have to be decided by a court. In short, there may be a duty to consult in those cases in which a specific First Nation can prove an inherent right to self-government in regard to the issue of matrimonial property and related rights, but, given the present state of the law, it cannot be said that the duty is clear at this point.

In my opinion, there is a clear duty to consult First Nations in regard to the proposed changes to law concerning matrimonial real property on reserve. It is independent from any inherent right to self-government and arises as a result of the First Nations' rights to use and to benefit from their respective reserve lands regardless of how the reserves were formed. Any additional duty to consult on the possible impact of MRP legislation on a right of self-government is less clear.

For the purposes of this opinion, and given the uncertainty of the nature of the right to self-government which a particular First Nation may be able to prove, only the right to be consulted arising from the First Nations' right to use and benefit from their reserve lands will be considered below.

2. Nature and Scope of the Duty to Consult

When discussing the duty to consult, the courts have made no distinction between the various ways in which reserves have been formed in terms of the nature of the aboriginal interest; nor have they distinguished between reserve lands and lands claimed under aboriginal title when discussing the type and depth of consultation required. Rather the level of consultation will vary with the severity of the infringement of the right.

> […] The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases

6 *R. v. Pamajewon*, 1996] 2 S.C.R. 821

> may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, par. 168

a) How Severe is the Impact?

There are several aspects to the proposed legislation which indicate that the impact may not be at the very severe end of the spectrum. The importance of the impact will obviously vary with the option chosen.

Options 2 and 3 foresee the possibility of First Nations' jurisdiction over the issue. Option 1 does not. As a first comment, any option which provides for First Nations' jurisdiction will cause relatively little infringement in comparison to one which does not. If the federal legislation relating to matrimonial real property will enact provisions which are meant to be applicable only until such time as First Nations enact their own rules, the impact is not likely to be seen by the courts as having a major negative effect.

In addition, the use and benefit of reserve lands vests in common in all the members of the Band for which the reserve has been set apart. The allocation of lands, made by the council with the consent of the Minister, "vests in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown".

> *Squamish Indian Band, supra*, par. 9 (B.C.C.A.)

This is not being changed. Legislation in regard to matrimonial real property will not change the collective interest of the band in the reserve lands. It will not diminish the size of the reserve, nor will it change the way in which it is being used. Rather, it will change the respective rights of spouses to lands which have already been allotted to one or both of them. Nonetheless, this will have impacts on the way in which land is held in the communities and on related social and economic issues. Indeed, it is meant to do so. This requires consultation and accommodation.

Assuming that the right to the use and benefit of reserve lands is part of the aboriginal and treaty rights protected by s. 35(1) of the *Constitution Act, 1982*, legislation providing for the equality of spouses in regard to matrimonial real property would help ensure respect for sub-section 35(4) which provides:

> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Where First Nations have negotiated a treaty or comprehensive claim agreement which, itself, provides that no amendment may be made without the consent of the First Nation party, consent will have to be sought in order that the Crown not be in breech of the clause requiring consent.

Other issues may arise, depending on the content of any eventual legislation. At this stage, it is impossible to tell if other considerations may render the impact more severe.

b) Ways in Which Consultation May Take Place

Again this depends on the actual legislation proposed and the determination of the severity of the impact. As the alternatives proposed to date have been somewhat vague and the content of possible federal legislation in Option #3 is entirely unknown, consultations on the eventual contents of proposed legislation would be in order. First Nations are entitled to be consulted directly. The duty of the Crown to consult cannot be delegated to a third party.[7]

At the very least, information on the substance of the proposed legislation should be made available, both in technical and in plain language form, to each First Nation as well as to regional and national organizations. A short questionnaire concerning present practices in the community could prove useful, both in terms of gathering information and in terms of helping people focus on the issues, but it should not be the only option for feedback. Where a First Nation requires additional information or explanation, this must be provided.

Adequate time, at least several months, for internal consultations must be foreseen and included in any deadline for response. Depending on the time of year, it can be very difficult to hold meetings on short notice, particularly in those communities where a sizeable portion of the population may be absent from the community while engaged in hunting, fishing or trapping activities. It may be useful to fund small regional meetings, preferably in different parts of each province and territory, as many First Nations do not have access to the kind of technical and legal assistance they may need to determine responses to potential impacts and this kind of information can be delivered at these meetings. When meetings are too large, there is a risk of losing the element of “direct” consultation.

Direct engagement in terms of sending information in an understandable format, explaining the potential impacts on First Nation interests, actively soliciting information relating to concerns and giving sufficient time for response are essential components of even the most minimal consultation.

> The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not

7 *Haida Nation v. British Columbia*, *supra*, par. 53

> discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.
>
> > The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met. The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.] [page 422]
>
> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388, par. 64

The assumption that the impacts of proposed legislation on MRP may be at the lower end of the spectrum is predicated primarily on there being a recognition of First Nation jurisdiction in the legislation, and that the rules enacted by the government of Canada could be supplanted by a First Nation's laws. If this were not the case, the impact could be greater and would then require a deeper level of consultation.

In addition, INAC has proposed that any solution must be in line with Canadian human rights, in line with constitutional law and enforceable. Although courts are not likely to view these requirements as having an adverse effect, additional requirements or restrictions on content of First Nations' laws may be seen to do so and could require additional consultation.

Conclusions

Impacts on Real Property Interests

The application of provincial law relating to matrimonial real property subject to the provisions of the *Indian Act* in case of inconsistency or conflict will:

- result in numerous situations in which the provincial law will not apply because of conflicts with the *Indian Act*. This will leave gaps in the applicable law and defeat much of the stated purpose for enacting the legislation;
- result in unequal treatment of individuals with matrimonial real property on reserves from province to province;
- result in unequal treatment between individuals with matrimonial real property on reserve and those with matrimonial real property off reserve within the same province;

Depending on the content, the enactment of substantive federal legislation on matrimonial real property could:

- enhance the coherence of the law;

- help ensure equality of treatment of individuals with matrimonial real property on reserve.

Issues in Regard to Consultation

- There is a duty to consult First Nations in regard to the proposed legislation as a result of their collective interests in the reserve lands set aside for their use and benefit.

- As the information to date has been relatively vague, particularly as concerns the possible content of federal legislation under Option #3, further consultation will be required on the eventual contents of any proposed legislation.

- If the legislation recognizes a right of First Nations to legislate on the subject, the impact will likely be seen as less negative than if there is no such recognition. In addition, the size of the reserve land base and the uses to which it can be put are not changed. Depending on the contents of the eventual legislation, there may be little negative impact on the First Nation's collective interest in the lands. The nature and scope of the duty to consult may then be at the lower end of the scale.

- Even at its most minimal, the duty to consult requires direct engagement with each First Nation. This cannot be delegated to a third party.

There are a number of uncertainties stemming from the fact that the options outlined are still vague. Nonetheless, I hope the above is helpful to you. If you have any questions, or if you would like any further issues explored, please do not hesitate to contact me.

Yours truly,

Diane Soroka

MATRIMONIAL REAL PROPERTY AND FIRST NATIONS

Paper submitted to the Ministerial Representative, Wendy Grant-John by
Danalyn J. MacKinnon, Barrister, Solicitor
February 26, 2007

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INTRODUCTION

In each province and territory in Canada, there exists a legislated regime to determine a fair and orderly settlement of property issues in the case of separating couples. Separation and divorce can have tremendous emotional impacts on the parties that may render them unable to sensibly and justly complete the final steps of a relationship. These legislative acts assist couples to share the financial benefits and burdens of the relationship, and to have some finality to allow each to continue with their new lives. First Nation couples can utilize the provincial legislation to settle all matters except the sharing or division of real property, including houses and land, which are located on reserves. Often, the home is the largest asset of the marriage.

"Indian lands" are within the exclusive jurisdiction of the federal government. Provincial legislation cannot determine the possession, ownership, disposition and financial interest of the separating spouses in the matrimonial home and land when it is located on reserve lands. The absence of a mechanism for First Nation couples to deal with the financial, and ownership issues related to the family matrimonial home and property leaves these individuals without the legitimate recourse to a process for the orderly and predictable settlement of matrimonial matters which has been afforded to other Canadians.

The Federal government is addressing the absence of a process for First Nation families by proposing three alternative legislative options. These options are:

First Option

- Pass a federal law to fully incorporate provincial laws relating to matrimonial property (provincial laws relating to matrimonial property currently do not fully apply to issues involving matrimonial real property)
- No amendment to address issues such as lawmaking power of First Nations in regard to MRP
- Provl law would apply unless and until first Nations Land Management Act or a self-govt arrangement was applicable

Second Option

- Involves passing a federal law to do two things
- First as an interim measure, a federal law would fully incorporate provincial matrimonial property laws (so that MRP issues would be addressed by provl law until a First Nation developed its own MRP law)
- Second federal law would recognize FN jurisdiction over MRP issues
- Provincial law would no longer apply to a First Nation once that First Nation had adopted its own MRP law

Third Option

- Involves passing a federal law to do two main things
- First, a federal law would establish specific principles or rules to address MRP issues on reserve on a national basis as an interim measure
- Second the same federal law would recognize FN jurisdiction over MRP issues
- The interim federal principles would no longer apply to a First Nation once a First Nation adopted its own MRP law

The purpose of this paper is to examine the legal implications of the proposed application of provincial legislation to First Nations. There are three questions forming the basis of this analysis, namely:

1. What are the specific legal issues related to the application of provincial MRP laws to First Nations, and the nature and extent of possible harmonization of provincial MRP laws with First Nation MRP needs?

2. Considering the various types of land holdings by First Nations both within and outside of the Indian Act, what problems or concerns can be anticipated if provincial MRP laws or provincial-type remedies were to be applied to First Nation land?

3. How would the application of provincial regimes impact on First Nation jurisdiction and treaty and aboriginal rights?

QUESTION #1

What are the specific legal issues related to the application of provincial MRP laws to First Nations, and the nature and extent of possible harmonization of provincial MRP laws with First Nation MRP needs?

There are a number of factors which would make the application of provincial MRP laws unwise and unwieldy. They are the cultural differences between First Nations and the mainstream, and the inconsistency among provinces regarding MRP application, terminology, and methodology.

1. Cultural Principles

From Victorian England, cultural concepts of the abilities, status and roles of a husband and wife in marriage, dictated the legal rights relevant to any breakdown of the relationships. The "unity" principle saw a husband and a wife becoming one person upon marriage, different and not equal. Women were considered too hysterical and addle-brained to handle money or property and everything they inherited or earned became the possession of their husband. Florence Fenwick Miller, one of the first British women to qualify to practice medicine, said in 1890:

> Under exclusively man-made laws women have been reduced to the most abject condition of legal slavery in which it is possible for human beings to be held…under the arbitrary domination of another's will …[1]

Custody of children was awarded to men, regardless of the reason for divorce, until the 1839 Infants and Child Custody Act. In 1870, the Married Women's Property Act allowed women to keep their earnings, personal property and small amounts of money while all else belonged to their husbands.

The state of unequal treatment and unfair characterizations of women in family law has given way over time as a result of the relentless efforts of women. Now property sharing systems exist which emphasize the partnership of marriage, equality and an equal sharing of wealth. Because these rules come from their own experience, the mainstream Canadian accepts these systems.

Many First Nation cultures did not share the English view of women, having instead equality between men and women in governance and social organization. The foisting of these English concepts of women upon First Nations by enactment of the Indian Act conflicted with many of the traditional systems of family entitlements among First Nations. The attempt to reverse discrimination in the Indian Act by remedial legislation such as Bill C31, has shown itself to be a failure.

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[1] Helena Wojtczak, Women's Status in Mid 19th Century England, Hastingspress,England.

The development of concepts of land ownership also has its roots in English history. Beginning in the relationship between feudal lord and tenant, the grant of land demonstrated a moral obligation and bond between the grantor and grantee.[2] The evolution in English law resulted in land being an indicator of wealth and status which included the individual right to sell, gift, encumber and exploit the land. Even terminology (fee simple, dower) used today reinforces the feudal roots of modern property law. Law became a commodity.

In his article, "Property as Ontology: On Aboriginal and English Understandings of Ownership", Bradley Bryan suggests that the Aboriginal conception of property, "would include things like intuitive relationships with nature, or particular understandings of the community's relationship to territory…".[3] Considering the contrast between the differing views of land, he says:

> For Westerners, these few words never end up carrying the full resonance of meaning and depth, as we are accustomed to see land and territory in terms of Cartesian space, and to see ownership as based on transactional value. The ontological structure of Aboriginal life necessarily means that 'ownership' per se never actually occurs or exists, because such things are simply not enframed as we would enframe them. Similarly, we do not have the ability to understand our land use in terms of climate, dreams, natural manifestations, or other key features of Aboriginal ontology…[4]

There is a gradual, but has never been a complete movement and commitment by First Nations to adopt the landholding or social/family historical concepts from Canadian mainstream society. In fact, such adoption has not seemed necessary except, as suggested now, in regard to the resolution of marital property issues.

In the contemplation of the application of provincial laws of any sort to First Nations, there are examples where the incursion of provincial family laws into the First Nation community has already occurred. That area is in regard to the issue of child welfare.

As a result of the amendments to the Indian Act in 1951, s.88 allowed the application of provincial child welfare laws to First Nation families. As the intervention became more intrusive, the numbers of First Nation children in care reached frightening proportions. The application of non-native concepts to First Nation families highlighted the lack of awareness of First Nation social structures and concepts.

For example, the concept of family is not restricted in First Nations to the nuclear family, but encompasses a larger group of individuals. While mainstream views may define the family as a father, mother and children, the First Nation view is that cousins, grandparents, aunts and uncles and others can all be part of the "family". There has been

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[2] Bradley Bryan, Property as Ontology: On Aboriginal and English Understandings of Ownership, (2000) 13 Can. J.L. & Juris. 3-31, para.18.
[3] Ibid. para. 60
[4] Ibid. para.61

a struggle to have this basic concept recognized by the courts and by legislation. It has made a difference when custody of children and standing to be heard has been considered.

For example, in Ontario the goal of child welfare legislation in regard to Crown wards is to have the child "adopted". It was accepted, until recently, that the legislated adoption of children necessitated that their identity be reconstructed to eliminate any reference to their natural parents and contact with their natural family.

Customary care is a process used by First Nations which respects the identity of the child and incorporates a child into a family setting by custom, without the necessity of court and social services intervention. Family and the community step forward to take care of the child. This is the traditional First Nation method of child rearing and care which recognizes the extended family and community as part of the child's spectrum of support. Recent amendments to the Child and Family Services Act of Ontario show a willingness to allow "open" adoptions and also an actual recognition of "customary care agreements". As Cindy Baldassi writes in her paper;

> Here is the great irony: recall that statutory adoption and custom adoption appear to be converging. Common and civil law adoptions now involve more openness, while some of the more distinct aspects of customary adoption are fading away…Non-Aboriginals are appropriating and often benefiting from Aboriginal customs like openness…[5]

Baldassi also suggests that First Nations are choosing to adopt concepts such as the "best interests" test in child custody cases. In her examination of the application of the "best interests" formula in regard to First Nations[6], Tae Mee Park contends that court cases have interpreted that test in a way which reduces the importance of race, culture and biological connections. She relies on statements such as that of Madam Justice Wilson in Racine v. Woods:

> In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.

Provincial legislation has never had to consider First Nation concepts in the operation of provincial MRP laws. The traditional First Nation views of land and family are intrinsically and individually different from those of the mainstream. How can those values be incorporated into provincial law? What incentive would there be for the provinces to take on the task of amending their legislation to allow the application of First Nation principles? It is not a likely scenario.

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[5] Cindy L. Baldassi, The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences (2006) 39 U.B.C.L. Rev. 63-100, para.70

[6] Tae Mee Park, In the Best Interests of the Aboriginal Child (November, 2003) 16 W.R.L.S.I. 43.

More likely it is that provincial legislation would be applied without consideration of the culture and values of First Nations. As we have seen in other areas of the law there is bound to be a lengthy process of court cases to gain recognition of the different cultural principles and circumstances of First Nations. For example, does the concept of "family assets" include assets used by all persons living in the home, including the extended family? How will the duties and obligations to non-nuclear family members be considered in regard to possession of the matrimonial home? What of houses and property that serves community purposes?

Compounding the difficulty of such a proposition is the fact that provincial and territorial legislation is not a consistent, standard set of legislative rules.

2. Lack of Consistency in Provincial Legislation

The significant issues arising from the breakdown of relationships include custody and support of children, spousal support and the division of assets including real property.

The objective of property division regimes is set out in the preamble to the Ontario Family Law Act as;

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within the marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children; Therefore…

While the spirit of some of these objectives may be shared across the country, each province has passed legislation based on its own priorities and thus created significant differences in legislation.

Marital Status

"Matrimony" is a rite or state of marriage.[7] "Matrimonial" property is the property of a married couple. In fact, there has been court refusal to apply the statutory relief in cases where the union has failed to meet the standards of validity in marriage.[8] The Family Law Act of Ontario sets out that a spouse, for the purpose of property rights, is :

> s.1.(1) "spouse" means either of two persons who,
> (a) are married to each other, or

[7] Oxford Dictionary
[8] Reaney v. Reaney (1990), 28 R.F.L. (3d) 52 (Ont. H.C.)

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

Some provincial legislation notes that "spouses" means "a man and a woman" who are married. [9]

While a number of provinces have enacted legislation to include common law couples or have established a separate regime for determination of common law unions, in many provinces including Ontario, the benefits of an "orderly and equitable settlement" of property issues has been reserved for married couples. As a result, unmarried couples have had to apply to the courts seeking equitable remedies to accomplish a just division. The principle behind the distinction between common law and married couples was articulated by Gonthier J. of the Supreme Court of Canada in Attorney General (Nova Scotia) v. Walsh as follows:

> It is by choice that married couples are subject to the obligations of marriage. When couples undertake such a life project, they commit to respect the consequences and obligations flowing from their choice. The choice to be subject to such obligations and to undertake a life-long commitment underlies and legitimates the system of benefits and obligations attached to marriage generally, and, in particular, those relating to matrimonial assets. To accept the respondent Walsh's argument -- thereby extending the presumption of equal division of matrimonial assets to common law couples -- would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system. In effect, to presume that common law couples want to be bound by the same obligations as married couples is contrary to their choice to live in a common law relationship without the obligations of marriage. [10]

It appears that there is movement to allow property settlement legislation for both common law and married couples and same sex couples, but these changes are slow and on this critical issue, provincial legislation is not uniform.

Method of Property Division

Historically, ownership was the determining factor in the division of property between married couples on separation. As there was a cultural norm that property should be held in the name of the husband, as the head of the household, this general practice lead to inequities on separation.

[9] For example see the Family Law Act of PEI, s.1(1)(g).
[10] Nova Scotia (Attorney General) v. Walsh [2002] 4 S.C.R. 325, para.201 (S.C.C.)

In the significant case of Murdoch v. Murdoch[11], the ranch lands of the marriage were owned by the husband. Relying on her contributions to the acquisition of the assets and to the marriage, the wife sought a one-half interest in three quarter-sections of land and other assets based on a claim of resulting or constructive trust. The facts established contributions of physical labour and financial contributions to the successive properties owned by the spouses. The majority of the court determined that there was no evidence of a common intention to share the beneficial interest or ownership in the property and dismissed the claims of the wife.

The unfairness to the wife in this case galvanized the movement to establish specific legislation to address the inequities of a settlement system based primarily on ownership. The matrimonial property acts across Canada establish a presumption that the spouses have a partnership in which the contributions are equal and that the spouses have a common intention to share the benefits, including financial, attained during their marriage.

The process for sharing these interests varies across the country, but can be said to follow two basic but different methodologies; asset division or equalization.

(a)Asset Division

In this method, certain assets are characterized as "family" assets for the purpose of division. In the case of the British Columbia legislation, for example, it characterizes family assets as, "Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose…". Much of the litigation involving this and similar acts relates to the definition of a family asset. In the British Columbia legislation, business assets are excluded unless a direct contribution is shown. Not all assets, therefore, are included in the calculations.

If the asset is a family asset, there is a presumption that each spouse is the owner of an undivided half interest in such assets. From this presumption, the spouse is entitled to the benefits of ownership – being able to sell or use the asset. The rise or fall in the value of the asset is assumed by an owner. A spouse who wishes to keep the asset must buy the portion owned by the other spouse. If a purchase does not occur, the court can order transfers of ownership in exchange for a compensation order.

This approach is distinctive from the Ontario legislation in a number of ways. The Ontario legislation does not confer ownership by operation of law. It determines that the owner of an asset must make a payment in relation to the "value" of the asset but it does not change ownership. All assets owned by the parties in Ontario are included in the equalization calculations.

[11] [1975] 1 S.C.R. 423

(b) Equalization

In this method, each spouse lists the assets that they own on the date of separation and their respective values. Deducted from the calculation for each spouse are debts of the spouse on the date of separation, assets (other than the family home) owned on the date of marriage, inheritances and gifts from third parties. The purpose is to try and capture the net equity of each spouse at the end of the marriage. After the deductions, each spouse has a "net family property" figure. The spouse with the larger net family property amount pays one-half of the difference to the other spouse so that each leave the marriage with the same amount. Here is a sample:

Sample Equalization

Assets	**Husband**	**Wife**
Rental property	$ 225,000	
House Contents	$ 10,000	
1996 Jeep		$ 9,000
2003 Tundra	$ 42,000	
Old Truck	$ 2,000	
Pension	$ 2,723	
Pension		$ 36,000
2001 Skidoo	$ 4,000	
Trailer	$ 250	
Yard Tractor & Equipment	$ 2,000	
Garage Tools	$ 5,000	
Credit Union Account	$ 1,300	
Total Assets	**$ 294,273**	**$ 45,000**
Debts		
Mortgage	$ 167,890	
Loan	$ 20,444	
Credit Card		$ 2,000
Total Debts	**$ 188,334**	**$ 2,000**
Net Family Property	**$ 105,939**	**$ 43,000**

$ 105,939 + 43,000 = $ 148,939
$ 148,939 x .5 = $ 74,469.50 - $ 43,000 = $ 31,469.50 (Husband pays to Wife)

The husband will be entitled to keep his assets, but he must pay $31, 469.50 to the wife to bring her equity at the end of the marriage to $74,469.50 and bring the husband's equity down to the same amount. This method of property settlement does not change ownership. In fact, it is disadvantageous to a party to claim ownership of disputed items as he or she will have to pay one half of the value to the other spouse.

While either method of MRP settlement can result in a similar division, the process to get to the final amount can be one which impacts on "ownership" or one which does not. It is important to note that almost all MRP regimes include all assets in these determinations, and not simply the home. The home is part of the valuation of the financial obligations and sharing but other assets and debts are incorporated. If a husband has $100,000 in the bank and the home is worth $100,000, would it be fair to require the wife to share the value of the home without the husband having to share the value of his savings?

There is one asset which is dealt within a different manner, and that is the matrimonial home.

Statutory Cohesion

In some provinces, the legislation dealing with MRP is included in one statute with other family law relief: custody, access, maintenance and exclusive possession. There is an interconnection between these different family law issues. Custody of children may have an impact on the making of an exclusive possession order. Maintenance may relate to the payment of a mortgage debt. These Acts are often cross-referenced.

In Ontario, the Family Law Act deals with support and property issues, but custody and access are relief provided for in the Children's Law Reform Act. The Partition and Sale of Property Act provides relief to property owners. For example, joint owners may have their tenancy severed and the property sold and proceeds divided. The Land Titles Act dictates the registration rules of property.

Not only does each province have its own MRP law, but there are other pieces of legislation which impact on and are related to the MRP statute. The question whether the MRP law can be applied alone in any situation will depend on the interdependence of the statutes in each particular province. The application of one statute may bring others into play in relation to the land.

3. Matrimonial Home

In Ontario, a "matrimonial home" is defined as, " Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home".[12] The Act further provides that there can be more than one "matrimonial home".

[12] Family Law Act, s.18(1)

In s.19 (1) each spouse has the right to possession of the matrimonial home. This does not create an interest in the property. This right of possession is a personal right and not a right in rem against creditors.[13] There is added protection of course in Ontario, as property can be designated as a matrimonial property on title, and the property cannot be transferred without spousal consent.

Further, the definition in the Ontario legislation does not exclude rental properties as a "matrimonial home". Thus, an apartment can be the subject of an order of exclusive possession even where a lease may be in the name of only one spouse.

Each province makes special allowance for the home of the spouses but characterizes it differently. For example, the Manitoba Family Property Act takes jurisdiction where the "habitual residence" of the spouses is in Manitoba and the "family home" is the home occupied as the family residence. In New Brunswick, the Marital Property Act provides that the marital home is "property occupied by a person or his or her spouse as a family residence."

4. Valuations

All of the MRP schemes require a valuation to be done of the assets. In regard to First Nation property this is particularly problematic. There are a number of possible approaches to valuation.

Ordinarily, the value of a home and land is to be "fair market value", that is the value that the property would obtain on sale. This presumes that a market exists and that a sale can realize the equity in the property. Generally in regard to First Nation land, only a right of possession under a Certificate of Possession can be transferred. In urban areas there may be an opportunity to conduct valuations based on properties nearby but off reserve. How fair is such a valuation if the property on reserve cannot be sold.

Another method of valuation is the replacement method which identifies the cost of replacing the home. Similarly, a value of the cost of original construction can be utilized. However, in remote or rural areas, the cost of construction of 'social housing' may exceed any reasonable value of the home.

The purpose of valuation is to provide that the spouse who is retaining the property will either pay one half of the value of the home to the spousal partner or purchase the one half of the property owned by the spouse. It may be that in many situations, there is no value to the matrimonial home.

[13] Royal Bank v. King (1991) 35 R.F.L. (3d) 325 (Ont. Gen Div.)

5. Common Law Remedies

As a result of the lack of MRP law for married or common law couples in the past, legal remedies that developed in other areas of the law came to be applied to allow some fairness in settlements.

The most common forms of relief are constructive and resulting trusts.

In the case of Pettkus v. Becker[14], the wife in a common law relationship of nearly 21 years sought a payment for her labour in the husband's bee-keeping business. Miss Becker supported Mr. Pettkus for 5 years and worked on the farm for 14 years. Dickson J. speaking of the constructive trust noted:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan [(1760) 2 Burr. 1005] put the matter in these words: "…the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money"…[15]

In deciding the matter in favour of Miss Becker, Dickson J. noted:

> On these facts, the first two requirements laid down in Rathwell have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[16]

Where the court finds a benefit to one party, a corresponding deprivation to another and no juristic reason for it, the unjust enrichment in those circumstances may compel the court to find that there is a constructive trust and award ownership of a portion of a property to the deprived party.

This equitable remedy is not without its limitations. Cases in proof of this remedy can be tedious recitations of domestic chores and household improvements. The concept that there must be a direct link between the labour and the property itself has waned somewhat.

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[14] Pettkus v. Becker [1980] 2 S.C.R. 834, (S.C.C.)
[15] Ibid. p.9 (QL)
[16] Ibid p.10(QL)

In Walsh, Bastarache J. sets out the advances in these claims:

> The Supreme Court has made many strides since *Murdoch* to recognize the presence of unjust enrichment in situations involving the dissolution of non-marital relationships. The Court has been of great assistance to these litigants by recognizing, for instance, that the provision of domestic chores may constitute the granting of a significant benefit under the first step of unjust enrichment: see *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38. The Court has also made it easy for parties who pass the first step (conferral of benefit) to prove that there has been a corresponding deprivation. At page 45 of *Sorochan*, the Court noted that the devotion of one's free labour [page409] typical in most relationships can easily be seen as a deprivation. On the third step, the Court has also reduced the claimant's burden by linking the absence of a juristic reason for the enrichment and deprivation to the absence of any obligation on the part of the contributing spouse to perform the work and services carried out during the relationship: *Sorochan, supra*, at p. 46. *Peter, supra*, at p. 1018, even contains the comment that the provision of services by itself creates a presumption that they were provided with the expectation of compensation.

A resulting trust is one where there is a common intention, express or implied, that one person hold property in trust for another. It is at the time of the transfer or purchase of property that this trust will be in evidence. In the Ontario case of Berdette v. Berdette,[17] the wife bought a matrimonial home and cottage in the joint names of herself and her husband. She claimed sole ownership of the assets and that the husband was holding his share in trust for her. This claim was successfully rebutted by her action of gifting an interest in the properties to her husband and allowing him to be a joint tenant.

The importance of this test of ownership usually arises in matrimonial matters when there is an increase in the value of an asset which occurs after separation. In those cases, the spouse would rather be an owner than simply receive an equalization payment.

The application of relief from other statutes is not necessarily invalidated by the Family Law provisions in Ontario. In fact, there are other remedies available to assist the MRP legislation under various other statutes. As Feldman J.A. notes in Stone v. Stone[18]:

> I am satisfied that as with the constructive trust, the Family Law Act does not exclude other applicable statutory or common law remedies which deal with the ownership of property at law and in equity, including the Fraudulent Conveyances Act. It is true that the legislature has not proceeded, as suggested by the 1993 Ontario Law Reform Commission Report on Family Law, [See Note 5 at end of

[17] Berdette v. Berdette (1991), 3 O.R. (3d) 513
[18] Stone v. Stone [2001] O.J. No.3282 (Ont.C.A.) para.44

> document] to extend and codify within the Family Law Act itself, what will constitute a fraudulent disposal of property by a spouse during cohabitation, made in order to defeat the potential interests of the other spouse, and which can therefore be set aside. However, where, on the facts, the Fraudulent Conveyances Act can apply, there is nothing in the Family Law Act which ousts the operation of the Fraudulent Conveyances Act as part of the process to determine the net family property of each spouse as of the applicable valuation date.

These equitable remedies are sometimes applied directly to the matrimonial property case or have been statutorily incorporated by the MRP statutes, often under the intention that the acts be applied fairly and equitably.

In provinces where MRP laws do not apply to common law couples, these equitable remedies have been the only recourse for a just and orderly division of family assets.

RECOMMENDATIONS RELATED TO QUESTION #1

It is clear that it would be a quagmire to subject "Indian Lands" to the catalogue of MRP legislation and rules found across this country.

Indian lands as reserve lands share a number of characteristics. These lands and any interests in them evolved from the same source. The people living on these lands share a similar history, culture and concept of family and land. Overall, the lands are owned by the same owner, the federal Crown, who has a vested interest and fiduciary duty to the people and the land itself. Unless the structure of these obligations changes, there should be consideration only of one MRP system to address the needs of First Nation people. There should be a separate MRP law for First Nations.

Harmonization of the MRP laws of the provinces with each other has not even been attempted. Harmonization of provincial laws with First Nations lacks even the basic history and tenets found between provinces.

All couples who are separating must have some certainty and the potential application of numerous and different MRP regimes to their situation would dissuade them from applying for relief. For example, a couple living in Saskatchewan for four years may have a habitual residence there while attending school, but may have a home on their First Nation in British Columbia. Which provincial law will apply?

There is much to be learned and adapted from provincial laws. The First Nation MRP law could utilize principles from provincial law including:

a) married, common law and same sex couples;
b) an equalization approach to property settlement;
c) a valuation method appropriate to the circumstances of each First Nation;

d) application of common law equitable remedies;
e) a land registry capable of registration of interests;
f) a right of immediate emergency possession in certain circumstances.

The MRP system would be adjudicated by a body chosen by the spouses such as a First Nation/tribal mechanism, an ADR process or the courts. Of primary importance, the adjudication must be subject to the traditions and laws of the First Nation. There must be legitimacy in the MRP process, a legitimacy which comes from recognition by the First Nation people of a mechanism which is rooted in their own culture.

QUESTION #2

Considering the various types of land holdings by First Nations both within and outside of the Indian Act, what problems or concerns can be anticipated if provincial MRP laws or provincial-type remedies were to be applied to First Nation land?

Each province maintains its own separate land registry system. In Ontario, the land title system is accessible electronically. Most land originates from a Crown grant and is then passed from each owner in succession. The original Crown grant recitation includes the description of the property and limitations on the fee simple. Limitations can include mineral and timber rights which continue to be held by the Crown. The land is called a "parcel".

Residential properties are usually held in joint tenancy or as tenants in common. Joint tenancy means that, instantly, upon the death of one owner, the surviving owner becomes the sole owner in fee simple of the land. Tenants in common, on the other hand, hold a percentage of land. The owners are able to leave the property to an heir, encumber their share and deal with it as an asset. For example, often in regard to cottage properties, a number of siblings may have a percentage interest in the property. While the land may be clearly defined by its description, the interest usually has no physical or actual identifiers. It is difficult to sell in the market.

Condominiums are sold as residential units. These units are also registered in the land titles system. Completion of a purchase of such a unit requires consent to be bound by the building's general agreement which establishes the rules of the building including common area expenses.

Parcel registers are a record of transactions involving the land including mortgages and other encumbrances.

All of the provincial systems maintain these records that:

a) identify ownership of the parcel;
b) identify the type of ownership;
c) establish the physical parameters and rights of the land;
d) identify liens and encumbrances against the land.

The rights of ownership include alienability of the land.

The current types of land interests for individual First Nation members include:

a) Certificate of Possession – This certificate under the Indian Act is issued to indicate the right of an individual to use and occupy a portion of reserve land. Once allotted and approved by the band council and the Minister, it cannot be rescinded easily. It is registered in the Indian Lands Registry and can be sold, transferred or willed to another band member. It can be held jointly or as tenants in common. It is considered lawful possession.
b) Certificate of Occupation – This is a temporary right of up to two years, to occupy reserve land but the interest does not include the rights associated with a Certificate of Possession.
c) Cardex Holding – In the past these interests were created and approved by the band and the Minister. It is considered a lawful interest but the physical descriptions are often inaccurate or vague.
d) Notice of Entitlement – Like the Cardex holding, this is a lawful interest where no title has been issued and the description is vague.
e) Location tickets – The previous system under the Indian Act, replaced by CP's.
f) Custom Allotments – Some of these interests were registered. A custom allotment made by a band council can be considered lawful if the Minister has given implied or express consent. By some traditions, the band council operates to deal with custom allotments without ministerial approval, and the Minister consider these allotments not to be lawful.
g) S.22 Lands – These are lawfully possessed lands that were in the possession of a First Nation member prior to the Indian Act.
h) Designated Lands – These are lands which were surrendered by the band and individuals may have interests.
i) Homes on Band Lands – Individual band members may build on the lands, not allotted, belonging to the band.
j) Housing agreements – This includes a number of scenarios:
    i) a band member rents a home from the band council as assigned to them;
    ii) a house is built by the band for a member who has a CP and the CP is charged until the mortgage is paid or a CP is to be provided after the charge is paid.
    iii) a member has a home built by the band on a custom allotment and agrees to forfeit rights if the charge is not paid.

These types of land interest are:

a) possessory in nature;
b) created largely with band and/or Ministerial consent;
c) often not identifiable with a metes and bounds description or survey;
d) held usually only by band members.

The interests in land registered by the Indian Land Registry are varied and carry the distinction of either being "lawful" or of some amorphous status.

In principle, most provincial land title system have a method of registering possessory interests in land, as opposed to ownership. In addition, the registration of residential units such as condos is done in conjunction with agreements as to uses and common areas. One can envision a registration system for on-reserve housing which includes a registerable agreement between the individual and the band as to usage, rights and obligations.

The problems of the application of provincial MRP laws to this land holding system would be enormous. There is no uniformity of land titles system throughout Canada. Each provincial system would have to accommodate the variety of First Nation land holdings. The alternative is that provincial land registries would require conformity to some of the characteristics of provincial land. This is where the problem lies.

Reserve land is owned by the Crown. Bands are unable to grant ownership to members with allotments, as the band does not own the land. If this were changed to comply with provincial systems, the communal nature of land could be lost. First Nation land would be parcelled, alienable and treated like any other provincially controlled land.

Without ownership, the MRP schemes of many provinces could not be applied to First Nation lands.

RECOMMENDATIONS RELATED TO QUESTION #2

The Indian Land Registry itself has the ability to become a reasonable land record system. This would be preferable as the fiduciary duties of the federal government to Indians would have to be applied in dealings with their land. This could be done with the implementation of a number of measures:

a) all lawful interest holdings and custom allotments should be registered in one category;
b) all house and rental interests should be registered in a second category.

The lawful interests must all become identifiable by description (surveys), transferable, willable, and chargeable with the consent of the band or by court order. All such interest holders would have the same rights. While there are a multitude of Indian Act and non-Indian Act methods of land interests, the act of registration can create a consistency in meaning.

In regard to the registration of houses and rental properties, these would be registered for the purposes of recording the interest and allowing orders of exclusive possession even where land is not involved.

It is conceivable that this land registry system can be administered outside the auspices of the Minister by a First Nation agency and be accessible by internet formatting.

The band or a court would be able to order changes in the holding of land or houses without Ministerial consent, but the land could not be alienated.

QUESTION #3

How would the application of provincial regimes impact on First Nation jurisdiction and treaty and aboriginal rights?

Usually, the largest asset forming the basis of provincial MRP resolutions is the home and land of the spouses. All MRP laws attempt to deal with this asset – valuing it, dividing it, transferring it, encumbering it and realizing its worth in some way.

Band councils have achieved more authority in recent years to lease and lend in regard to the development of housing on reserve. These are now essential capabilities at a time when First Nation communities and homes are terribly over-crowded. MRP laws can dictate who is going to live in a house on a First Nation reserve. This has been the purview of the First Nation governments. If First Nations cannot control such a fundamental community resource as housing, where is the incentive to become more independant. The application of provincial MRP systems can take away a necessary authority from First Nation governments.

The Indian Act itself, in s.88, establishes that provincial laws may apply to Indians:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

In R. v. Cote however, the Supreme Court clarified that treaty rights gain even more protection through this enactment.

Notably, the application of provincial laws relates only to Indians, but not Indian lands. If a decision were made to have provincial MRP laws apply to First Nations, would such laws be captured or applied using s.88. In the case of Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture) provincial laws were to be examined using the "pith and substance" test which requires examination of the purpose and effect of the provincial legislation.[19]

What is the "pith and substance" of provincial MRP legislation? Is it the orderly sharing of financial resources after separation, or is it a scheme to redistribute property ownership? A court is more likely to see legislation which does not confer ownership of land, as simply a family law resolution mechanism. In addition, the MRP laws are directed to the settlement of the affairs of individual Indians rather than directly

[19] Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture) [2002] S.C.J. No.33 (S.C.C.) para.40

pertaining to Indian lands. So far, the redistributive effect of the MRP legislations has made them inapplicable under the protective interpretation of s.88.

Treaties identify the rights of the signatories in regard to the land bases to be used and surrendered and the rights regarding the use of the surrendered lands, particularly hunting and fishing. The retention of these rights to hunt and fish has always been important to the cultural and social underpinnings of First Nation society. These fundamental liberties were given further protection by the enactment of s.35 of the Charter of Rights and Freedoms.

Most of the litigation involving First Nation people in the last twenty years has related to the constant and never ending attempt by provincial governments to control and limit the ability of First Nation people to use the land. Provincial hunting and fishing laws are invoked to charge First Nation individuals with breaches of the provincial regulations. What has developed from these charges is a recognition of the rights of First Nation communities to use traditional territories. If collective rights are established, individuals must still show that they have membership in the collective.

After decades of fighting provincial attempts to control land use, it would seem particularly ironic to invite the application of any provincial legislation relating to land including MRP laws. If the application of these laws in any way results in the furtherance of individual land ownership and even its alienability, the land base which supports the culture of First Nations will be lost through their own act.

RECOMMENDATIONS RELATED TO QUESTION #3

Provincial MRP laws do not apply to First Nation land as a result of s.88 of the Indian Act and the protection of treaty rights. The imposition of provincial law on First Nation territories would create tremendous uncertainty, undermine First Nation local authority and destroy the very relationship of the collective community with the land.

Matrimonial Property on Reserves: Rights and Remedies by law or policy

By
Teressa Nahanee

For purposes of this paper reference was made the *Indian Act*, the *Divorce Act*, and the British Columbia *Family Relations Act*. Four kinds of family homes were considered including: Scenario "A": those located on Certificate of Possession lands under s. 20 of the Indian Act; Scenario "B": those located on "Band Lands" but held by custom allotment or tradition including under a Band Council Resolution not using s. 20 of the Indian Act; Scenario "C": "rent-to-own" social housing where land is "Band land" or allotted by custom or tradition and the home is under a mortgage by CMHC, bank or financial institution; or Scenario "D": rental social housing on Band lands where homes are owned and managed by the Band with no possible individual ownership. Three kinds of couples were considered: first, where both spouses are Members of the Band; second, where a Band member is married to another Indian from a different Band; and third, where the Band member is married to a non-Indian. Reference was also made to the Gender Analysis document of the Department of Indian and Northern Affairs.

Matrimonial Property

FRA Section 56

The *Family Relations Act*, R.S.B.C. 1996, Ch. 128, Part 5, applies only to married couples; common-law partners are deliberately excluded from its application. Under the FRA (BC), each spouse is entitled to an interest in each family asset after March 31, 1979 when it is first made. This interest is triggered by one of the following: (a) a declaratory judgment of a provincial superior court made upon application by 2 spouses married to each other or by one spouse stating the spouses have no reasonable prospect of reconciliation with each other ["Judgment"]; (b) an order for dissolution of marriage or judicial separation "Order", (c)an order declaring the marriage null and void ["Declaration"] or a (d) separation agreement [Agreement]. It applies to a marriage entered into before or after March 31, 1979. In Scenario A, B, C and D the spouses are legally married under Provincial Law.

The following discussion does not apply to common-law partners whether hetereosexual or same-sex partners who are not legally married under Provincial law. Those variances will be considered separately.

For purposes of gender equality, landholders may be male or female including those who hold a Certificate of Possession under s. 20 of the *Indian Act* ["C.P."] or persons holding a custom-allotment or traditional land ["Custom land"]. Where one spouse is a Band Member and the other is a Member of a First Nation or is a non-Indian, the Band Member may be either male or female. No distinction as to rights is based on sex. Rent-to-own Units may be held by a Band Member of either sex as no rights arise because of sex.

Vacuum in the Law

Since 1986, it has been evident that there is no federal law applicable to the division of matrimonial property on reserves, and provincial law does not apply. Section 88 of the *Indian Act*, R.S.C. 1985, does not bring in the application of the provincial Family Relations Act because division of land is under federal jurisdiction, and is governed by federal law. Provincial governments do not have jurisdiction because the federal government derives its powers under s. 91(24) of the *Constitution Act*, 1867.

The vacuum in the law with respect to matrimonial property has disadvantaged women more than men as supported by the many studies that have been conducted on this issue in recent years. The issuance of Certificate of Possession by the Minister was historically made to male locatees. Where women locatees exist they have often received Certificates of Possession through widowhood or through inheritance from their fathers. Today there is no requirement in the *Indian Act* to issue C.P.s only to male locatees; the Minister has jurisdiction to issue C.P.s to men or women, and in the case of married couples, to issue the C.P. in both names. Once a Band Council has allocated land under s. 20, the BCR is submitted to the Minister and the Minister issues a Certificate of Possession. The Minister has total discretion over its disposition up to issuance of the C.P. Once the C.P. is issued, the locatee

holds the land and his or her ownership cannot be interfered with by the Band Council. [Cooper case[1]]

The Minister's Complete Authority under s. 20

In discussing an Indian estate case the Federal Court Trial Division in *Songhees Indian Band v. Canada (Minister of Indian Affairs and Northern Development), [2006] F.C.J. No. 1308, Tremblay-Lamer J.* stated at paragraph 29:

> Subsection 20(1) gives the Minister a complete *carte blanche* to exercise the discretion to approve of the lawful occupation of land. Subsection 20(4) grants the Minister complete authority to issue a temporary possession, or, pursuant to subsection 20(5), a Certificate of Occupation. Section 23 grants the Minister the complete authority to determine compensation to be paid for improvements. Section 26 gives the Minister the complete authority to change a Certificate of Possession if there has been an error. Band Council approval not required under s. 50.

The disposition of C.P. land rests solely at the discretion of the Minister, but the locatee also has a firm interest in the land. Only rarely can the Minister act on his own without application by the locatee. The Minister may re-issue the C.P. upon application by the locatee. For example, a locatee can sell her or his interest in C.P. land for consideration to any other member of the Band at any time. A father or parents may transfer their C.P. to a son or daughter at any time when the child reaches the age of majority upon payment of one dollar. [A minor child will likely have the land held in trust until he or she reaches the age of majority.] The C.P. land can be sold and upon application by the locatee, the land will be transferred by the Minister who will re-issue the C.P.

Any married couple, upon application to the Minister, today may have the C.P. reissued in both names or the names of both spouses provided both are Members of the same Band and the land is part of the reserve(s) of the Band. One couple I advised on transferring a C.P. to two sons was not aware that the wife was not listed on the C.P. The husband transferred some land to the two sons, and new C.P.s was issued by the Minister in favor of the two sons. With

[1] *Songhees Indian Band v. Canada (Minister of Indian Affairs)*, [2005] F.C.J. No. 1794, Harrington, J.

respect to land kept by the couple, I advised the wife to have her husband list her name on the C.P. Her husband applied to have his wife's name added [both are members of the Band from birth] and the C.P. was re-issued in both names. There is no legal barrier that keeps husbands or wives from listing the other spouse on a current C.P. where both spouses are Members of the Band. The locatee may take action on the title unilaterally, although the Minister must approve of any transfer. The Minister has no powers to interfere with a locatee's land once the C.P. has been issued unless it is for the purpose of overturning the issuance of the C.P.

Prior to April 15, 1985, wives of male Band members gained Indian status and Band membership and as such all spouses may have their name listed on C.P.s This application to add the wife's or husband's name to a C.P. that exists today may be made by any husband or wife whose spouse is a Band member of the same band, whether through legal marriage or acquired status and membership. This is an individual act not barred by statute and Band Councils have no jurisdiction over these lands. The loss of the jurisdiction over C.P. lands was well explained by the Federal Court in the recent Cooper case. C.P.s can be sold by the locatee, or leased to Band members, other Indians or non-Indian individuals or corporations. C.P.s also change hands through estates.

Many Bands, if not the majority of them, have not passed Band Council Resolutions to create C.P.s over the past 20 years under s. 20 of the Indian Act. The reality is that Band governments have lost total jurisdiction over C.P. lands. As the Court held in *Songhees* above:

> The Court was of the view that once an allotment is made, the right to use and benefit from the land shifts from the band as a collective to the individual band member who is given a certain amount of autonomy in the exercise of entrepreneurship and development of the land. The band's interest disappears or is at least suspended. Ultimately, the Court held that it would defeat the scheme of the Act to read in the words "with the consent of the Band" into subsection 58(3). The duty of the Minister was toward the law, not the Band.

In devising a solution to matrimonial property on reserve lands held under s. 20 are to be treated

differently from custom allotments or traditional land holdings which are solely under Band jurisdiction. The registry for s. 20 lands is with the Minister; the registry for custom allotments or traditional land holdings is with the Band Land Manager or Administrator. Devising a solution for s. 20 lands will not interfere with Canada's self government initiative, policy on self government, or constitutional rights under ss. 25 and 35 of the *Constitution Act, 1982*. The s. 20 lands are not within that purview or jurisdiction; these lands are under the total control of the Minister. The only way Bands can resume the jurisdiction they lost almost 100 years ago through Parliament is if Canada abolished Certificates of Possession and their registration by the Department. Until that event occurs, the Minister has the discretion and power to rectify matrimonial property rights on C.P. lands and he may do so without interfering with self government.

Remedy for historical C.P.s

To achieve equality of ownership of a C.P. whether held solely by a male or a female Band Member spouse, there are three alternatives. First, do nothing. Second, encourage C.P. holders to add the Band member spouse to the C.P. by application because it is allowed for under the current legislation. Third, legislate co-ownership of historical C.P.s where the matrimonial home is located on C.P. land. This amendment will apply only where both spouses are Band members in the same Band, including women who married into the Band prior to April 15, 1985. It would include women who married in from other Bands and non-Indian women who gained Indian status through marriage prior to 1985.

Spouse

There is no definition of "spouse" in the *Indian Act*, R.S.C. 1985, c. I-5 as am. although there is reference to "spouses and common-law partners" in s. 81(1)(p.2) for living spouses and to "survivor spouses" in s. 48 dealing with estates of on-reserve Indians. The distinction between "spouses" and "common-law partners" seems to indicate there is a difference between the two terms, but neither term is defined in the Indian Act.

There is a definition of spouse in the *Divorce Act*: "spouse" means either of two persons who are married to

each other. (s. 2 Definitions, *Divorce Act of Canada*, 1985, c. 3 (2nd Supp.).

The Family *Relations Act* of British Columbia defines "spouse" as a person who is married to another person for all purposes of the Act and includes a person who lived with another person in a marriage-like relationship for a period of at least 2 years if application under this Act is made within one year after they ceased to live together. The marriage under Provincial law may be to a person of the same gender. For these latter married-like relationships a.k.a. common-law marriages, Parts 5 and 6 of the Family Relations Act do not apply. Part 5 deals with matrimonial property; Part 6 deals with divisions of pensions. Under this legislation, marital property is not included for division.

For purposes of this analysis, the discussion of spousal rights is a discussion of persons who are married under provincial law including same-sex couples. Because common-law partners do not enjoy equal benefits with married persons under Provincial law, this analysis will include separate consideration for common-law couples that live on reserve.

Rights and remedies are tied to married persons. For them to be effective, the definition of "spouse" in the federal Divorce Act must be included as an amendment to the Indian Act. The alternative is to take the term "survivor" from the Indian Act, meaning any person who has lived with another person for the last year of the deceased's life. Translated to "spouse" this would mean any person who has lived in a marriage-like partnership for a period of at least one full year with another person is a "spouse" for purposes of marriage property. This is a higher standard than the *Divorce Act* and a higher standard than the *Family Relations Act* both of which exempt common-law partners from claiming marriage property including land and houses. For this reason, only married persons who can divorce are considered under this first section on rights and remedies. Common-law partners and custom marriages will be considered separately.

Executive Summary on the Present Law And Proposed Amendments to the *Indian Act*

I. Spouses are Members of the Same First Nation – Current Law[2]

Rights	"A" Home on CP land	"B" home on custom allotment	"C" rent-to-own social housing	"D" rental social housing
50% ownership of matrimonial property	Courts/ Minister have no jurisdiction or law to split matrimonial property. Locatee must consent and apply to Minister.	Courts/Band Councils have no jurisdiction or law to split matrimonial property without consent of holder.	Courts/Band Councils have no jurisdiction or law to split rent-to-own matrimonial property without consent of party paying mortgage	n/a Land and Home owned by Band, not individuals
Obtain court order for exclusive possession	Courts/ Minister have no jurisdiction or law to allow for exclusive possession	Courts/Band Councils have no jurisdiction or law to allow for exclusive possession	Courts/Band Councils have no jurisdiction or law to order for exclusive possession of rent-to-own matrimonial property	n/a. Land and house belongs to the Band
Obtain court order for interim possession	Courts/ Minister have no jurisdiction or law to allow for interim possession	Courts/Band Councils have no jurisdiction or law to allow for interim possession	Courts/Band Councils have no jurisdiction or law to order interim possession of rent-to-own matrimonial property	n/a. Land and House belongs to the Band
Obtain order for prohibition against sale w/o consent of spouse	Courts/ Minister have no jurisdiction or law to prohibit sale of matrimonial property without consent of spouse if spouse is not a co-locatee	Courts/Band Councils have no jurisdiction or law to prohibit sale of matrimonial property without consent of spouse if spouse is not a joint holder	Courts/Band Councils have no jurisdiction or law to prohibit sale of rent-to-own matrimonial property without consent of spouse	n/a. Land and House belongs to the Band
Obtain order for partition of property	Courts/ Minister have no jurisdiction or law to partition matrimonial property without consent of locatee	Courts/Band Councils have no jurisdiction or law to partition matrimonial property without consent of holder	Courts/Band Councils have no jurisdiction or law to partition rent-to-own matrimonial property without consent of holder(s)	n/a. Land and House belongs to the Band
Obtain order for sale of real property	Courts/ Minister have no jurisdiction or law to order sale of matrimonial property; only locate can sell; if spouse is not a joint locatee, the locatee can sell at will	Courts/Band Councils have no jurisdiction or law to order sale of matrimonial property; holder may sell at will if spouse is not a joint holder	Courts/Band Councils have no jurisdiction or law to order sale of rent-to-own matrimonial property [if mortgage payments stop, Band may re-sell]	n/a. Land and House belongs to the Band
Obtain order for compensation where pty sold by spouse	Courts/ Minister have no jurisdiction or law to order compensation where property sold by spouse, especially if CP is not held jointly. Some courts have ordered compensation based on rent value of an on-reserve home, not where MRP was sold	Courts/Band Councils have no jurisdiction or law to order compensation where property sold by spouse, especially if property is not jointly held	Courts/Band Councils have no jurisdiction or law to order compensation where rent-to-own property sold by spouse [unless there is a Band policy]	n/a. Land and House belongs to the Band

[2] *Indian Act*, R.S.C. 1985, C. I-5, s. 20, s. 81(1)(p.2); *First Nations Land Management Ac, S.C. 1999, c. 24, s.17t*; *Family Relations Act*, R.S.B.C.1996, Chap. 128

Order severance of joint tenancy	Courts/ Minister have no jurisdiction to sever joint tenancy unilaterally	Courts/Band Councils have no jurisdiction to order severance of joint tenancy unilaterally	Courts/Band Councils have no jurisdiction to order severance of joint tenancy [unless there is a Band policy]	n/a. Land and House belongs to the Band
Order to restrain spouse from making a gift of property	Courts/ Minister have no jurisdiction to prevent a spouse from making a gift, especially if property is not jointly held	Courts/Band Councils have no jurisdiction to prevent a spouse from making a gift if property is not jointly held	Courts/Band Councils have no jurisdiction to prevent a spouse from making a gift unless governed by Band policy	n/a. Land and House belongs to the Band

II. One Spouse is a Member of the First Nation on whose reserve the Matrimonial Home is Located and the other spouse is a Member of a Different First Nation or is a non-Indian [Same rights and remedies for non-Band Member First Nations spouse and non-Indian spouse] – Current Law[3]

Rights	"A" Home on CP land	"B" home on custom allotment	"C" rent-to-own social housing	"D" rental social housing
50% ownership of matrimonial property	Courts/ Minister have no jurisdiction or law to split matrimonial property unilaterally	Courts/Band Councils have no jurisdiction or law to split matrimonial property unilaterally	Courts/Band Councils have no jurisdiction or law to split rent-to-own matrimonial property unless there is a Band policy	n/a Land and Home owned by Band, not individuals
Obtain court order for exclusive possession	Courts/ Minister have no jurisdiction or law to allow for exclusive possession	Courts/Band Councils have no jurisdiction or law to allow for exclusive possession	Courts/Band Councils have no jurisdiction or law to order for exclusive possession of rent-to-own matrimonial property	n/a. Land and house belongs to the Band
Obtain court order for interim possession	Courts/ Minister have no jurisdiction or law to allow for interim possession	Courts/Band Councils have no jurisdiction or law to allow for interim possession	Courts/Band Councils have no jurisdiction or law to order interim possession of rent-to-own matrimonial property	n/a. Land and House belongs to the Band
Obtain order for prohibition against sale without consent of spouse	Courts/ Minister have no jurisdiction or law to prohibit sale of matrimonial property without consent of spouse if property not jointly held	Courts/Band Councils have no jurisdiction or law to prohibit sale of matrimonial property without consent of spouse if property is not jointly held	Courts/Band Councils have no jurisdiction or law to prohibit sale of rent-to-own matrimonial property without consent of spouse unless there is a Band policy	n/a. Land and House belongs to the Band
Obtain order for partition of property	Courts/ Minister have no jurisdiction or law to partition matrimonial property unilaterally	Courts/Band Councils have no jurisdiction or law to partition matrimonial property unilaterally	Courts/Band Councils have no jurisdiction or law to partition rent-to-own matrimonial property unless there is a Band policy	n/a. Land and House belongs to the Band
Obtain order for sale of real property	Courts/ Minister have no jurisdiction or law to order sale of matrimonial property unilaterally; locatee must agree and apply	Courts/Band Councils have no jurisdiction or law to order sale of matrimonial property unilaterally	Courts/Band Councils have no jurisdiction or law to order sale of rent-to-own matrimonial property	n/a. Land and House belongs to the Band

[3] *Indian Act*, R.S.C. 1985, C. I-5, s. 20, s. 81(1)(p.2); *First Nations Land Management Act, S.C. 1999, c. 24, s.17*; *Family Relations Act*, R.S.B.C.1996, Chap. 128

Obtain order for compensation where property sold by spouse	Courts/ Minister have no jurisdiction or law to order compensation where property sold by spouse, especially if property is not jointly held;	Courts/Band Councils have no jurisdiction or law to order compensation where property sold by spouse; consent is required for joint holders	Courts/Band Councils have no jurisdiction or law to order compensation where rent-to-own property sold by spouse	n/a. Land and House belongs to the Band
Order severance of joint tenancy	Courts/ Minister have no jurisdiction to sever joint tenancy; locatee must make application to the Minister	Courts/Band Councils have no jurisdiction to order severance of joint tenancy unilaterally	Courts/Band Councils have no jurisdiction to order severance of joint tenancy	n/a. Land and House belongs to the Band
Order to restrain spouse from making a gift of property	Courts/ Minister have no jurisdiction to prevent a spouse from making a gift unless property is held jointly	Courts/Band Councils have no jurisdiction to prevent a spouse from making a gift	Courts/Band Councils have no jurisdiction to prevent a spouse from making a gift	n/a. Land and House belongs to the Band

III. Spouses are Members of the Same First Nation – Amend Legislation[4]

Rights	"A" Home on CP land	"B" home on custom allotment	"C" rent-to-own social housing	"D" rental social housing
Define "spouse" in s. 2, meaning two persons married under provincial law				
Add s. 20(7) and s. 81(2) to grant superior courts jurisdiction to deal with matrimonial property on reserves				
50% ownership of matrimonial property	-amend s. 24 [Transfer of Possession] to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon separation or divorce	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon separation or divorce	n/a. Land and house belong to the Band
Obtain court order[5] for exclusive possession	-amend s. 20(5) Certificate of Occupation to allow exclusive possession permanently or for a term of years upon notice or order, judgment or declaration regarding divorce or separation	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon notice of an order, judgment or declaration regarding divorce or separation	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon notice of an order, judgment or declaration regarding divorce or separation	n/a. Land and house belong to the Band
Obtain court order for interim possession	-amend s. 20(5) Certificate of Possession to allow for interim possession for a term of years upon notice of	-amend s. 81(1)(p.2) to allow for interim possession by one spouse notice of an order,	-amend s. 81(1)(p.2) to allow for interim possession of rent-to-own matrimonial property by one spouse	n/a. Land and House belong to the Band

[4] *Indian Act*, s. 20, s. 81(1)(p.2), *First Nations Land Management Act*

[5] "order" includes judgment or declaration on nullity or marriage

	an order, judgment or declaration regarding divorce or separation	judgment or declaration regarding divorce or separation	-court order to decide who will dispose of mortgage	
Obtain order for prohibition against sale without consent of spouse	-amend s. 24 [Transfer of Possession] to prohibit sale of CP lands pending divorce or separation without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of custom allotment pending divorce or separation without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of rent-to-own unit pending divorce or separation without consent of spouse and ensure arrangement for disposal of mortgage	n/a Land and Home belong to Band
Obtain order for partition of property	-amend s.20(2) to allow for partition of matrimonial property upon divorce or separation	-amend s. 81(1)(p.2) to allow for partition of matrimonial property upon divorce or separation	-amend s. 81(1)(p.2) to allow for partition of rent-to-own matrimonial property upon divorce or separation	n/a Land and Home belong to Band
Obtain order for sale of real property	-amend s. 24 (Transfer of Possession] to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses	-amend s. 81(1)(p.2) to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses	-amend s. 81(1)(p.2) to allow for sale of rent-to-own matrimonial property and division of proceeds between divorcing or separating spouses	n/a Land and Home belong to Band
Obtain order for compensation where property sold by spouse	-amend s. 24 (Transfer of Possession] to allow for compensation to be paid to spouse where the holder has sold matrimonial property	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold matrimonial property	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold rent-to-own matrimonial property	n/a Land and Home belong to Band
Order severance of joint tenancy	-amend s. 20(2) Certificate of Possession to allow the Minister to sever joint tenancy upon divorce or separation	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy upon divorce or separation	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy for rent-tow-own matrimonial property upon divorce or separation	n/a Land and Home belong to Band
Order to restrain spouse from making a gift of property	-amend s. 24 Transfer of Possession to allow Minister to restrain spouse from making a gift of property contrary to court order	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of property contrary to court order	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of rent-to-own matrimonial property contrary to court order	n/a Land and Home belong to Band

IV. One Spouse is a Member of the First Nation on whose reserve the Matrimonial Home is Located and the other spouse is a Member of a Different First Nation or is a non-Indian [Same rights and remedies for non-Band Member First Nations spouse and non-Indian spouse] –Amend Law[6]

Rights	"A" Home on CP land	"B" home on custom allotment	"C" rent-to-own social housing	"D" rental social housing
Define "spouse" in s. 2, meaning two persons married under provincial law				
Add s. 20(7) and s. 81(2) to grant superior courts jurisdiction to deal with matrimonial property on reserves				
50% ownership of matrimonial property	-amend s. 24 [Transfer of Possession] to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation; allow life estate or occupancy for a period of years; underlying title to Band member children	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation	n/a. Land and house belong to the Band
Obtain court order for exclusive possession	-amend s. 20(5) Certificate of Occupation to allow exclusive possession for a term of years or a life estate, with underlying title to band member children	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon divorce or separation including by non-Band member or non-Indian spouse	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon divorce or separation including by non-Band member/non-Indian spouse	n/a. Land and house belong to the Band
Obtain court order for interim possession	-amend s. 20(5) Certificate of Possession to allow for interim possession for a term of years; no change in title	-amend s. 81(1)(p.2) to allow for interim possession by one spouse upon divorce or separation including by non-Band member or non-Indian spouse	-amend s. 81(1)(p.2) to allow for interim possession of rent-to-own matrimonial property by one spouse, including non-Band member/non-Indian spouse -court order to decide who will dispose of mortgage	n/a. Land and House belong to the Band
Obtain order for prohibition against sale without consent of spouse	-amend s. 24 [Transfer of Possession] to prohibit sale of CP lands pending divorce or separation without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of custom allotment pending divorce or separation without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of rent-to-own unit pending divorce or separation without consent of spouse and ensure arrangement for disposal of mortgage	n/a Land and Home belong to Band

[6] *Indian Act*, R.S.C. 1985, C. I-5, s. 20, s. 81(1)(p.2)

Obtain order for partition of property	-amend s.20(2) to allow for partition of matrimonial property upon divorce or separation; allow life estate or occupation for a period of years with underlying title to children	-amend s. 81(1)(p.2) to allow for partition of matrimonial property upon divorce or separation including for benefit of non-Band member/non-Indian spouse	-amend s. 81(1)(p.2) to allow for partition of rent-to-own matrimonial property upon divorce or separation including for benefit of non-Band member/non-Indian spouse	n/a Land and Home belong to Band
Obtain order for sale of real property	-amend s. 24 (Transfer of Possession] to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses	-amend s. 81(1)(p.2) to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses	-amend s. 81(1)(p.2) to allow for sale of rent-to-own matrimonial property and division of proceeds between divorcing or separating spouses	n/a Land and Home belong to Band
Obtain order for compensation where property sold by spouse	-amend s. 24 (Transfer of Possession] to allow for compensation to be paid to spouse where the locatee has sold matrimonial property	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold matrimonial property	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold rent-to-own matrimonial property	n/a Land and Home belong to Band
Order severance of joint tenancy	-not applicable unless joint tenancy is held with other than spouse i.e. brother, sister of spouse, then allow for severance of joint tenancy	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy upon triggering event i.e. court order, separation, where spouse is a joint tenant with other than his or her spouse	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy for rent-tow-own matrimonial property upon triggering event i.e. court order, separation, where spouse is a joint tenant with other than his or her spouse	n/a Land and Home belong to Band
Order to restrain spouse from making a gift of property	-amend s. 24 Transfer of Possession to allow Minister to restrain spouse from making a gift of property contrary to court order	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of property contrary to court order	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of rent-to-own matrimonial property contrary to court order	n/a Land and Home belong to Band

Before considering the four fact situations and marriage and divorce between same Band Member couples and spouses, one of whom is a non-Band member or non-Indian, there are a number of related considerations.

Right of Survivor to Occupy Lands

Under s. 48(3) of the Indian Act, the Minister may grant a survivor spouse the right to occupy lands of the Band member spouse. No end date is provided in the Act, but this is presumably a "life estate" for the survivor. The Act does not prohibit consideration of non-Band member or non-Indian spouses.

This right to a life estate or life interest can be achieved by amending the Indian Act to make it applicable upon receiving notice of an Order, Judgment, Declaration or Agreement ending the marriage. [Ref. Part 5—Matrimonial Property, s. 56(1), FRA RSBC][7]

This right to a life estate can apply to Scenario "A, "B", and "C" subject to an Order, Judgment, Declaration or Agreement of which the Minister has notice for C.P. holders and the Land Manager has notice for a Custom-held Allotment and the Band Housing Authority has notice for a rent-to-own Unit. It would not apply to Scenario "D" where the Band owns both the land and the house and it is a rental unit. In that instance, the Band policy on occupation would govern.

Separation Agreements

[7] Part 5—Matrimonial Property
Equality of entitlement to family assets on marriage breakup
56(1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
(a) a separation agreement,
(b) a declaratory judgment under s. 57
(c) an order for dissolution of marriage or judicial separation, or
(d) an order declaring the marriage null and void
respect the marriage is first made.
(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common
(3) An interest under subsection (1) is subject to
(a) an order under this Part or Part 6, or
(b) a marriage agreement or a separation agreement
(4) This section applies to a marriage entered into before or after March 31, 1979.
Declaratory Judgment
57 On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

Separation Agreements are allowed for under provincial Family Relations Acts and Orders, Judgments and Declarations are made subject to them. The caselaw, however, makes it evident that generally female spouses are disadvantaged under separation agreements. It is also evident from studies on aboriginal family violence that aboriginal women are disproportionately abused in marriage or common-law relationships to a greater extent than other Canadian women. Police enforcement is generally lacking in rural and isolated reserves, and aboriginal women have less access to police protection from family violence than other Canadians. Studies available from Corrections Canada also show that aboriginal females are the victims of sexual assault in their homes disproportionate to other Canadians. Half the victims of aboriginal sexual assault are females under the age of 7 and three-quarters are under the age of 18. Access to legal counsel for aboriginal women is almost impossibility because it is not funded by Legal Aid, lawyers are not accessible by aboriginal women in rural and isolated communities, and family violence likely will prevent women from obtaining legal advice prior to signing a separation agreement. A review of separation agreements by a court to determine if it was coerced or fair at the time of signing will take years or the cost, no matter how small, will be prohibitive for aboriginal female spouses. Some studies have shown that aboriginal men are also subject to violence and they may be treated unfairly in a separation agreement.

If separation agreements can override Orders, Judgments and Declaration, the definition of "separation agreements" should be clearly defined in the Indian Act. It could be in the form of a verbal agreement, a statutory declaration, affidavit or some document with legal force short of a court-sanctioned agreement.

Treat "living" spouses the same as "survivors"

The Minister could allow a non-Band Member spouse to reside on reserve in the matrimonial home after separation with an amendment to the Indian Act. The precedent exists in Indian Estate law under the Indian Act, s. 48(3). Estate law also allows the Minister to consider if children will be provided for, and if not, for the Minister to make some provision for them from the estate. For separation the Minister could consider whether the children have been

provided for adequately in the separation agreement or any other Judgment, Order or Declaration.

The most basic problem in dealing with matrimonial property on reserves is the lack of jurisdiction by superior courts of the province [or any court] to deal with the disposition of real property upon divorce or separation of couples living on reserves. For Certificate of Possession lands [s. 20], a new section 20(7) could give superior courts jurisdiction to made orders, judgments or declarations in the field of matrimonial property rights covered under provincial *Family Relations* Acts [Part 5 in B.C.]. This need not detract from the Minister's powers under s. 20, but allow him to level the playing field for spouses who divorce or separate on Indian reserves so their rights and remedies reflect Canadian law off reserves.

The Minister's powers under s. 20 can be amended to deal with allocating the house to the spouse who keeps, maintains and raises the children, whether it is the Band member or the separated spouse. The amendment should make allowances for Band members married to a Band member; a Band member married to a non-Band member; and a Band member married to a non-Indian.

The amendment can deal with occupation of the matrimonial home upon separation by providing superior courts with jurisdiction under the *Indian Act*, in a new s. 20(7), for example. Subject to the wording of the amendment, the separating spouse who will live in the home can be given exclusive possession in an order, judgment or declaration by a court that requires the Minister to take action under s. 20. Compensation to the departing spouse can be allowed for in an Indian Act amendment. The amendment can be used by the Minister to transfer the land interest to the spouse with children in the form of a life estate with the underlying title going to the children or child of the marriage where one spouse is a non-Band member Indian or is a non-Indian. The amendment can provide that the Land will not be sold, partitioned or leased without the written approval of the occupying spouse. Life estate land can revert to the original owner-spouse or his or her estate, as allowed under the amendment. "Life estate" is a term that should defined under s. 2 of the *Indian Act*.

Custom-Allotment or Traditionally-held Band Land

Prior to separation or divorce the First Nations couple lived in a family home on custom or traditional land [also know as "Band land"]. The Band Council has complete jurisdiction over allocation of Band lands including custom allotments or traditional land holdings. The Land Manager or Administrator can transfer the land interest to one or both Members based on a new provision in the *Indian Act*, at s. 81(2). This section would provide superior courts with jurisdiction over matrimonial property upon divorce or separation of a couple married under provincial law.

Custom or traditionally-held Band land is registered in the Band Land registry and is generally land set aside by Band Council Resolution but not under s. 20 of the Indian Act. Custom or traditionally-held Band Land may be held by one spouse or two as tenants in common or in joint tenancy if both spouses are Members of the Band.

The Band Council has jurisdiction under s. 81(1)(p.2) to provide for residence of spouses and children on Band land. This land is not in the DIAND Land Registry system but in a separate Band-controlled system. With an amendment to s. 81(1)(p.2), the interest of a non-Band or non-Indian spouse can take the form of a life estate or life interest after divorce or separation. The provision for spouses under s. 81(1)(p.2) is gender neutral and may be for the benefit of a male or female non-Band member or non-Indian spouse. This amendment to this section can explicitly allow Band Councils to pass bylaws dealing with the range of remedies provided under provincial law i.e. equal division of property, compensation, exclusive possession, etc. In the context of self-government, this is a field that can be covered by specifying how real property will be disposed of upon divorce or separation. A companion amendment is required, s. 81(2), to grant jurisdiction to the courts to deal with these areas of specificity upon divorce or separation.

Where the custom or traditional Lot is a "House Lot" as described by CMHC it will be too small to partition and some other arrangement will have to be made i.e. one gets the land/house and the other receives compensation in lieu of. It should be noted that custom or traditional lands can either be "house Lots", large Lots [5 acres – 600 acres in B.C.], or multiple Lots [some Band members may hold up

to 5-10 Lots on reserve which they have inherited, been allocated, or bought]. The partition of other than "House Lots" [as described by CMHC] likely will leave land on which to build a new dwelling. House Lots are too small to be partitioned.

Where the custom or traditional land is partitionable, the survey will likely have to be paid for by the landholder. The non-Band member or non-Indian spouse can hold a life estate or life-interest through an amendment to s. 81(1)(P.2) of the Indian Act. In the alternative, the house and Lot can be sold and the proceeds distributed according to the amendment.

The Band Council has the power under s. 81(1)(p.2) to provide for the rights of spouses and children who reside with a Member of the Band on reserve. To allow for rights guaranteed under the FRA, Section 81(1)(p.2) would need to be amended to allow courts to make orders for exclusive or interim possession and all other rights under s. 56 [FRA].

The by-law making powers of Band Councils are subject to the Canadian Charter of Rights and Freedoms. The repeal of s. 67 of the Canadian Human Rights Act will also free Councils to exercise their jurisdiction in a non-discriminatory manner for the benefit of the community. Land managers, administrators, and housing managers of Bands would, through this amendment, be able to register the interest of divorcing and separating spouses. For custom lands, the amendment would recognize a life interest of a spouse, male or female, or allow for registration of life interests of non-Band member or non-Indian spouses. It would also allow for the registration of interests of minor children or a child of such marriages subject to a life estate of the non-Band member or non-Indian spouse.

Matrimonial Property on C.P. Land

Scenario A

(1) Both Band Members on C.P. Land

The two members are "married" under the laws of the Province and the right to a one-half interest in family assets is triggered upon separation or divorce. To date, courts have not had jurisdiction to apply a *Family Relations Act* [Part 5] to division of matrimonial property

on Indian reserves. An amendment to s. 24 of the *Indian Act* dealing with transfer of possession or a new s. 20(7) could fill the void. Such an amendment would give a court of competent jurisdiction the power to recognize a 50% undivided interest in matrimonial property of each spouse upon divorce or separation. The amendment would apply to a First Nations couple who lived in a family home on C.P. land where both are Members of the Band. Only the Minister has jurisdiction over C.P. land; the Band Council has lost jurisdiction. (Cooper Case[8]) The amendment would give the Minister the power to enter the name of each spouse on the C.P., or divide it according to the Court order, judgment or declaration.

The amendment would resolve the problem identified in Darbyshire-Joseph v. Darbyshire-Joseph[9] [wife married into the Band prior to 1985 and became a Band member] where the C.P. was held in both names and could not be partitioned or sold under provincial law. Allocation of an interest or half-interest, partition and sale can be allowed for under amendments to the Indian Act at s. 24.

Remedy.

Recognizing that the Minister has exclusive jurisdiction over Certificate of Possession lands and Band Councils have no jurisdiction or persuasive power over the Minister's discretion, amendments are required to ss. 20 and 24 to deal specifically with matrimonial property.

Under s. 66 of the B.C. FRA the Court may deal with a range of issues respecting matrimonial property. The Indian Act currently does not give the Minister powers to take any of these actions under ss. 20 and 24 dealing with Certificate of Possession and the courts have no legislative basis for assuming jurisdiction.

V. Spouses are Members of the Same First Nation on C.P. Land – Amend Legislation[10]

Rights	"A" Home on CP land
Definition of "spouse"	Add a definition of "spouse" to s. 2, Indian Act that matches the definition

[8] Songhees Indian Band v. Canada (Minister of Indian Affairs), [2005] F.C.J. No. 1794, Harrington J.
[9] Darbyshire-Joseph v. Darbyshire-Joseph, [1998] BCD Cir 5.40.30.00-02 BCSC, Kirkpatrick J. (Nov. 30, 1998)
[10] *Indian Act*, s. 20, s. 81(1)(p.2), *First Nations Land Management Act*

	in the Family Relations Act. Two persons married under provincial law.
50% ownership of matrimonial property	-amend s. 24 [Transfer of Possession] to grant spouses automatic 50% ownership of matrimonial property upon notice of a court order, judgment, or declaration. May include "separation agreement"
Obtain court order for exclusive possession	-amend s. 20(5) Certificates of Occupation to allow exclusive possession permanently or for a term of years on notice of a court order, judgment, or declaration. May include "separation agreement".
Obtain court order for interim possession	-amend s. 20(5) Certificate of Occupation to allow for interim possession for a term of years on notice of a court order, judgment, or declaration. May include "separation agreement".
Obtain order for prohibition against sale without consent of spouse	-amend s. 24 [Transfer of Possession] to prohibit sale of CP lands pending divorce or separation without consent of spouse
Obtain order for partition of property	-amend s.20(2) to allow for partition of matrimonial property upon notice of a court order, judgment or declaration. May include "separation agreement".
Obtain order for sale of real property	-amend s. 24 (Transfer of Possession] to allow for sale of matrimonial property and division of proceeds between divorcing and separating spouses upon notice of a court order, judgment or declaration.
Obtain order for compensation where property sold by spouse	-amend s. 24 (Transfer of Possession] to allow for compensation to be paid to spouse where the holder has sold matrimonial property
Order severance of joint tenancy	-amend s. 20(2) Certificate of Possession to allow the Minister to sever joint tenancy upon notice of a court order, judgment or declaration. May include "separation".
Order to restrain spouse from making a gift of property	-amend s. 24 Transfer of Possession to allow Minister to restrain spouse from making a gift of property in anticipation of or as a result of divorce.
Create s. 20(7) Court jurisdiction in matrimonial property	Create a section similar to the "Appeal" section at s. 14 and s. 47, to allow courts of competent jurisdiction [superior courts] to deal with matrimonial property when CP lands are involved.

Amend s. 20 of the Indian Act to give the courts jurisdiction over on-reserve matrimonial property without detracting from the Minister's powers under ss. 20 and 24. Under an amended s. 20 or 24, as the case may be, the Court may by order, judgment or declaration, do any of the following [s. 66(2), FRA] where spouses are members of the same Band:

a. Declare the ownership of or right of possession to property;
b. order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years and alter the C.P. accordingly;
c. order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
d. order partition or sale of property and payment to be made out of the proceeds of the sale to one or both spouses in specified proportions or amounts [precedent, s. 50, Indian Act];
e. order that property forming all or a part of the share of either or both spouses be transferred to, or

in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family C.P.s affected by the divorce or separation;

f. If property is owned by spouses as joint tenants, sever the joint tenancy.

g. If, on application, the Minister is satisfied that a spouse has made or intends to make a gift of property to a third person, or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under s. 20, the court may restrain the making of a gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse;

h. restrain a locatee from disposing of family assets until the other party establishes a claim [s. 67, FRA]. Such direction could include direction as to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party.

i. Make an order exclusive or interim possession of matrimonial property.

(2) Band Member married to non-Band Member Indian or a non-Indian on C.P. Land

The spouses must be "married" under the laws of the Province and the right to a one-half interest in family assets is triggered upon divorce or separation. Prior to separation or divorce the couple lived in a family home on C.P. land.

The amendment could allow a non-Band Member, First Nation, spouse or non-Indian spouse to reside on reserve in the matrimonial home after separation. The Minister's powers under s. 20 can be amended to grant jurisdiction to a court of competent jurisdiction to deal with allocating the house to the spouse who keeps, maintains and raises the children, whether it is the Band member or the separated spouse. The Court can deal with occupation of the matrimonial home upon separation.

The amendment could allow the courts to grant exclusive possession to a non-Band member or non-Indian

spouse in the form of a life estate or for a period of years. Compensation to the departing spouse can be allowed for in the Order, Judgment or Declaration. The Order, Judgment, or Declaration can be used to transfer the land interest to the spouse with children in the form of a life estate with the underlying title going to the children or child of the marriage. Exclusive possession can be given to the non-Band member or non-Indian spouse in the Order, Judgment, or Declaration with no transfer of land and provide that the Land will not be sold, partitioned or leased without the written approval of the occupying spouse. Life estate land can revert to the original owner-spouse or his or her estate.

Remedy

A legislative amendment is required to s. 20 to allow the Minister to partition C.P. land based on an Order, Judgment, or Declaration where one of the spouses is an Indian, but not a Band member where the land is located or to a non-Indian. Orders of the Court can be by consent.

VI. One Spouse is a Member of the First Nation on whose reserve the Matrimonial Home is Located and the other spouse is a Member of a Different First Nation or is a non-Indian on C.P. Land [Same rights and remedies for non-Band Member First Nations spouse and non-Indian spouse] – Amend Current Law[11]

Rights	"A" Home on CP land
Definition of "spouse"	Add a definition of "spouse" to s. 2, Indian Act that matches the definition in the Family Relations Act. Two persons married under provincial law.
Definition of "life estate"	Amend s. 2 to create a definition of "life estate"
50% ownership of matrimonial property	-amend s. 24 [Transfer of Possession] to grant spouses automatic 50% ownership of matrimonial property upon notice of a court order, judgment or declaration. May include "separation agreement". Court to have jurisdiction to allow life estate or occupancy for a period of years; underlying title to Band member children
Obtain court order for exclusive possession	-amend s. 20(5) Certificate of Occupation to allow exclusive possession for a term of years or a life estate, with underlying title to band member children upon notice of a court order, judgment or declaration. May include "separation agreement"
Obtain court order for interim possession	-amend s. 20(5) Certificate of Possession to allow for interim possession for a term of years with no change in title. Minister to act on notice of a court order, judgment or declaration. May include "separation agreement".
Obtain order for prohibition against sale without consent of spouse	-amend s. 24 [Transfer of Possession] to prohibit sale of CP lands pending divorce or separation without consent of spouse

[11] *Indian Act*, R.S.C. 1985, C. I-5, s. 20, s. 81(1)(p.2); *First Nations Land Management Act, S.C. 1999, c. 24, s.17*; *Family Relations Act*, R.S.B.C.1996, Chap. 128

Obtain order for partition of property	-amend s.20(2) to allow for partition of matrimonial property upon divorce or separation; allow life estate or occupation for a period of years with underlying title to children upon receipt of court order, judgment or declaration. May include "separation agreement".
Obtain order for sale of real property	-amend s. 24 (Transfer of Possession] to allow for sale of matrimonial property and division of proceeds between divorcing and separating spouses upon receipt of court order, judgment or declaration. May include "separation agreement".
Obtain order for compensation where property sold by spouse	-amend s. 24 (Transfer of Possession] to allow for compensation to be paid to non-Band member or non-Indian spouse where the holder has sold matrimonial property
Order severance of joint tenancy	-not applicable unless joint tenancy is held with other than spouse i.e. brother, sister of spouse, then allow for severance of joint tenancy
Order to restrain spouse from making a gift of property	-amend s. 24 Transfer of Possession to allow Minister to restrain locatee spouse from making a gift of property contrary to court order
Create s. 20(7) Court jurisdiction in matrimonial property	Create a section similar to the "Appeal" section at s. 14 and s. 47, to allow courts of competent jurisdiction [superior courts] to deal with matrimonial property when CP lands are involved.

The amendment could also allow the Minister to consider whether the children have been provided for in the Order, Judgment, or Declaration i.e. living arrangement, accommodation including where the children or child of the marriage are Band members. For certainty, in this scenario, life estates can be provided for in case of separation agreements with "life estate" being made a defined term under s. 2.

Reversionary interest of C.P. land allowing for a life estate can be dealt with in the Indian Act amendment. The land can be returned to the spousal owner or the children or child of the marriage.

Amend s. 20 of the Indian Act to give the courts jurisdiction over on-reserve matrimonial property without detracting from the Minister's powers under ss. 20 and 24. Under an amended s. 20 or 24, as the case may be, where one spouse is a member of the Band on whose reserve the matrimonial property is located and the other spouse is a Member of another Band but is a registered Indian or where one spouse is non-Indian, the court may by order, judgment or declaration:

(a) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either for life or for a term of years[12] and alter the C.P. accordingly;

[12] This term is from the FRA (RSBC)

(b) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
(c) order partition or sale of property and payment to be made out of the proceeds of the sale to one or both spouses in specified proportions or amounts [precedent, s. 50, Indian Act];
(d) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family C.P.s subject to a life estate interest of the non-Band member or non-Indian spouse;
(e) If property is owned as joint tenants with a Third Party Band Member, sever the joint tenancy.
(f) restrain the making of a gift or transfer, or vest all or a portion of the property in, or in trust for, the a child or children of the marriage subject to a life interest to be held by the non-Band member spouse;
(g) make an order with respect to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party.
(h) Make an order for interim or exclusive possession of matrimonial property to be held in trust for a child or children of the marriage subject to a life interest of the non-Band member or non-Indian spouse.

Matrimonial Property on Custom Allotted Land

Scenario B

(1) Band Member married to another Band Member on Custom or Traditional Land

The two members must be "married" under the laws of the Province and the right to a one-half interest in family assets is triggered on separation or divorce. A new section is required that can be called s. 81(2) that grants superior courts jurisdiction to deal matrimonial property upon divorce or separation. The lack of jurisdiction by courts with respect to C.P. lands is the same for custom or traditionally-held land. Where spouses have married under the laws of the state [a province] and divorced under the laws of the state, there is a requirement for courts to

have jurisdiction with respect to the disposition of reserve lands. The disposition of those lands can be specified in a Band bylaw under s. 81(1)(p.2) but they will not be effective for individuals unless they can enforce their rights and have remedies. Specificity in these Band bylaws will determine the powers of the court on disposition of marital property.

Upon receipt of notice of an Order, Judgment, or Declaration being received by the Land Manager or Administrator of the Band responsible for land records, a division or property can be recorded in the Band's land records.

Unlike s. 20 or Certificate of Possession lands, the Band Council does not lose control of Band lands that have been allocated by Band custom or traditionally-held lands. All of the Band lands are within the jurisdiction of Band Councils. The s. 81(1)(p.2) bylaws on spousal residency can apply to custom allotments or traditionally-held lands.

The court can provide under s. 81(2) for disposition of the marriage property including the land and house subject to a Band bylaw passed under s. 81(1)(p.2) The amendment can allow for sale and partition of the matrimonial property and disposition of the proceeds subject to an Order, Judgment, or Declaration.

House Lots would be exempted from partition because of their size.

Remedy.

VII. Spouses are Members of the Same First Nation on Custom or Traditional Land – Amend Legislation[13]

Rights	"B" home on custom allotment
Definition of "spouse"	Add a definition of "spouse" to s. 2, Indian Act that matches the definition in the Family Relations Act. Two persons married under provincial law.
Definition of "life estate"	Amend s. 2 to create a definition of "life estate"
Add s. 81(2) Court jurisdiction and matrimonial property	Add a section 81(2) giving courts of competent jurisdiction or superior courts the jurisdiction to make order with respect to matrimonial property [referencing s. 81(1)(p.2) & (p.1).
50% ownership of matrimonial property	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation
Obtain court order for exclusive	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon

[13] *Indian Act*, s. 20, s. 81(1)(p.2), *First Nations Land Management Act*

possession	triggering event i.e. court order, separation under new s. 81(2)
Obtain court order for interim possession	-amend s. 81(1)(p.2) to allow for interim possession by one spouse upon triggering event i.e. court order, separation under new s. 81(2)
Obtain order for prohibition against sale without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of custom allotment pending divorce or separation without consent of spouse under new s. 81(2)
Obtain order for partition of property	-amend s. 81(1)(p.2) to allow for partition of matrimonial property upon divorce or separation under s. 81(2)
Obtain order for sale of real property	-amend s. 81(1)(p.2) to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses under new s. 81(2)
Obtain order for compensation where property sold by spouse	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold matrimonial property
Order severance of joint tenancy	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy upon triggering event i.e. court order, separation made under new s. 81(2)
Order to restrain spouse from making a gift of property	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of property contrary to court order under new s. 81(2)

The Band Council has powers to deal with spousal residency under s. 81(1)(p.2) bylaws, but courts have no jurisdiction over matrimonial property. Some legislative clarification and jurisdiction of courts and Band Councils may require recognition of powers to deal with divorce or separation and its impact on custom allotments or traditionally held Band lands.

How the Administrator or Land Manager will administer these court orders, judgment and declaration can be dealt with under bylaws passed by Band Councils under s. 81(1)(p.2). For certainty, bylaws under this section of the Indian Act can deal with life estates or specified years of occupancy. The new definition of "life estate" under s. 2 will apply. For greater certainty a legislative amendment to s. 81(1)(p.2) can clarify that such Band bylaws are subject to the Canadian Charter of Rights and Freedoms and to the Canadian Human Rights Act.

While there is no barrier in the Indian Act preventing Band Councils from passing Band bylaws dealing with division of matrimonial property on reserves, the courts do not have jurisdiction to make orders on disposition of reserve lands. A legislative amendment may be required to s. 81(1(p.2) to allow courts to partition custom allotments or traditionally-held Band land and provide the necessary Order, Judgment, or Declaration except for House Lots. The court could also consider whether the children have been provided for in the Order, Judgment, or Declaration i.e. living arrangement, accommodation.

Under a new s. 81(2), where a spouse is a Member of the Band on whose reserve the matrimonial property is

located and the other spouse is a Member of the same Band, a court may by order, judgment or declaration:

(a) Declare the ownership of or right of possession to property;
(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years and alter the title accordingly;
(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division
(d) order partition or sale of property and payment to be made out of the proceeds of the sale to one or both spouses in specified proportions or amounts
(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family allotments or traditional holdings affected by the divorce or separation;
(f) If property is owned by spouses as joint tenants, sever the joint tenancy.
(g) If the court is satisfied that a spouse has made or intends to make a gift of property to a third person, or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under Band bylaw, it may restrain the making of a gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse;
(h) restrain a traditional land-holder from disposing of family assets until the other party establishes a claim [s. 67, FRA]. Such an order could include direction as to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party.
(i) Make an order for interim or exclusive possession of matrimonial property.

(2) Band Member married to non-Band Member Indian or to a non-Indian on custom-allotted or traditional Band Land

The spouses must be "married" under the laws of the Province and the right to a one-half interest in family assets is triggered upon divorce or separation. Prior to separation or divorce the couple lived in a family home on custom allotted or traditionally-held Band land.

The Band Council has the power under s. 81(1)(p.2) to deal with spousal occupation on reserve land including the rights of non-Band member or non-Indian spouses. A new section, s. 81(2), can give jurisdiction to the courts to deal with matrimonial property rights and remedies on reserve including for Band members married to non-Band member Indians or non-Indians.

For custom allotments or traditionally-held band land, where the land is more than a House Lot, it can be dealt with by the courts including exclusive possession, interim possession, life interest or interest for a period of years/time in exchange for consideration. The courts can deal with the rights of children to occupancy and inheritance. This would include consideration of which spouse was keeping, maintaining and raising the children in the former matrimonial home. The separating spouse who will live in the home can be given exclusive possession for life or for a period of years by the Band under its bylaw-making power under s. 81(1)(p.2) and this rights can be enforceable in the courts. Compensation to the departing spouse can be allowed for in Order, Judgment, or Declaration. The Order, Judgment, or Declaration can be used to transfer the land interest to the spouse with children in the form of a life estate with the underlying title going to the children or child of the marriage. Exclusive possession can be dealt with in the Band by-law with no transfer of land and provide that the Land will not be sold, partitioned or leased without the written approval of the occupying spouse. Life estate land can revert to the original owner-spouse or his or her estate.

Remedy

VIII. One spouse is a Band member and the other spouse is a non-Band member or a non-Indian on Custom or Traditional Land – Amend Legislation[14]

Rights	"B" home on custom allotment
Definition of "spouse"	Add a definition of "spouse" to s. 2, Indian Act that matches the definition in the Family Relations Act. Two persons married under provincial law.
Definition of "life estate"	Amend s. 2 to create a definition of "life estate"
Add s. 81(2) Court jurisdiction and matrimonial property	Add a section 81(2) giving courts of competent jurisdiction or superior courts the jurisdiction to make order with respect to matrimonial property [referencing s. 81(1)(p.2) & (p.1).
50% ownership of matrimonial property	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon divorce or separation
Obtain court order for exclusive possession	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon triggering event i.e. court order, separation under new s. 81(2)
Obtain court order for interim possession	-amend s. 81(1)(p.2) to allow for interim possession by one spouse upon triggering event i.e. court order, separation under new s. 81(2)
Obtain order for prohibition against sale without consent of spouse	-amend s. 81(1)(p.2) to prohibit sale of custom allotment pending divorce or separation without consent of spouse under new s. 81(2)
Obtain order for partition of property	-amend s. 81(1)(p.2) to allow for partition of matrimonial property upon divorce or separation under s. 81(2)
Obtain order for sale of real property	-amend s. 81(1)(p.2) to allow for sale of matrimonial property and division of proceeds between divorcing or separating spouses under new s. 81(2)
Obtain order for compensation where property sold by spouse	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold matrimonial property
Order severance of joint tenancy	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy upon triggering event i.e. court order, separation made under new s. 81(2)
Order to restrain spouse from making a gift of property	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of property contrary to court order under new s. 81(2)

The Band Council has powers to deal with spousal residency under s. 81(1)(p.2), including for residency or non-Band member or non-Indian spouses. For greater certainty a legislative amendment to s. 81(1)(p.2) can clarify that such Band bylaws are subject to the Canadian Charter of Rights and Freedoms and to the Canadian Human Rights Act. Under a new section, 81(2) superior courts can be given jurisdiction to deal with matrimonial property rights and remedies upon divorce or separation.

Some legislative clarification and jurisdiction of Band Councils may require recognition of powers to deal with divorce or separation and its impact on custom allotments or traditionally held Band lands including where one spouse, male or female, is a member of a different Band or is a non-Indian. With the amendments of 1985, wives are no longer involuntarily transferred to the husband's band, and women no longer lose their Band membership automatically. A non-Band member spouse of either sex may

[14] *Indian Act*, s. 20, s. 81(1)(p.2), *First Nations Land Management Act*

be living on reserve land in a matrimonial home held in title by their male or female spouse. After 1985, non-Indian women did not gain Indian status and Band membership upon marriage. Because there is a limited possibility such spouses—male or female—will obtain Band membership in the spouse's Band, and because of the huge increase in the presence of non-Band member or non-Indian spouses living on reserves today, alternatives like "life-estates" need to be explored and addressed. It is the most feasible option for resolving the problem of individual vs. collective rights to reserve lands.

A legislative amendment may be required to s. 81(1(p.2) to allow Band Councils to partition custom allotments or traditionally-held Band land based on notice of an Order, Judgment or Declaration. It could also allow the Band to consider whether the children have been provided for in the separation agreement i.e. living arrangement, accommodation.

Reversionary interest of custom allotments or traditionally-held Band land partitioned to allow for a life estate can be dealt with in the Indian Act amendment. Reversion of title could be to the original holder, or a child or children of the marriage.

Under a new s. 81(2), where a spouse is a Member of the Band on whose reserve the matrimonial property is located and the other spouse is non-Band member Indian or non-Indian, a court may by order, judgment or declaration do any of the following:

(a) Declare the ownership of or right of possession to property;
(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse for life or for a term of years and alter the land holding accordingly;
(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division
(d) order partition or sale of property and payment to be made out of the proceeds of the sale to one or both spouses in specified proportions or amounts [precedent, s. 50, Indian Act];

(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family allotments or traditional holdings affected by the divorce or separation;

(f) If property is owned by a spouse as joint tenants with other than the spouse, sever the joint tenancy.

(g) Prevent either spouse from making a gift of property to a third person, or transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under Band bylaw, and vest all or a portion of the property in, or in trust for, the other spouse;

(h) restrain a traditional land-holder from disposing of family assets until the other party establishes a claim [s. 67, FRA]. Such an order could include direction as to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party

(i) make an order on interim or exclusive possession, interim possession or compensation of matrimonial property to either spouse.

Scenario C

(1) Band Member married to another Band Member living in rent-to-own social housing

Social housing that is rented-to-own and occupied by married couples requires that one of the two Band member spouses hold land traditionally or by allotment from the Chief and Council. If it is "social housing", it may be built on Band lands that are held only by the Band and not transferred in title to the home-owner. It may still be classified in the Band land records as "Band land" but may be transferred with the house if the house is sold or passes through an estate. More generally, a parent of a Band member may allocate a "House Lot" for the son or daughter to build a home. This "House Lot" [size established by CMHC) is transferred from the land holder to the Band in exchange for a CMHC mortgage that is used to build social housing. The House Lot remains in the name of the Band until the mortgage is discharged. When the House

Lot is transferred from the holder to the Band for a mortgage it may be held in the name or one or both spouses and it will be returned in the same designation.

The Band Council has the power under s. 81(1)(p.2) to deal with spousal occupation on reserve land including the rights of spouses who are both Band members. While the Band Council can deal with the range of rights and remedies provided under Part 5 of the FRA, this will not resolve the problem for married couples on reserves. Courts must be given the jurisdiction to deal with the disposition of matrimonial property on reserve upon divorce or separation. A new section, s. 81(2), can give jurisdiction to the courts to deal with matrimonial property rights and remedies on reserve including for Band members married to Band members.

Upon notice of an Order, Judgment or Declaration under the proposed s. 81(2), the Land Manager or Administrator responsible for land and housing on reserve will ensure that one or both parties will discharge the mortgage. The Order, Judgment, or Declaration will be registered against the title so that when the mortgage is discharged, title will be registered according to it. For example, if the wife keeps the children and the house, the Order, Judgment, or Declaration will cover who is responsible for discharging the mortgage. It will also address the question(s) of exclusive possession or interim possession. The party disposing of the mortgage will likely get title once the land is returned to the holder of the custom-allotment or traditional land holding.

In one instance where a rent-to-own land holder turned over the Lot to the Band and then did not live there with his wife but allowed another Band member to assume the mortgage and pay it off, the land was transferred to the person who paid the mortgage. When she died not having disposed of the entire mortgage, the land was transferred to her adult children and they assumed responsibility for disposing of the mortgage. The original owner of the custom or traditional Lot agreed to this transfer by signing a transfer document, and his wife also signed. The administrative transfer was completed by Band Council Resolution recognizing the new landholders as tenants in common.

If neither spouse agrees to dispose of the mortgage to the satisfaction of the Band, another Band member can assume the mortgage and eventually get title to the custom or traditional Lot for that consideration. Consideration for payments already made by the separating or divorced couple can form the basis of an agreement between the Band/the couple and the new mortgagee.

Remedy.

IX. Spouses are Members of the Same First Nation – Amend Legislation[15]

Rights	"C" rent-to-own social housing
Definition of "spouse"	Add a definition of "spouse" to s. 2, Indian Act that matches the definition in the Family Relations Act. Two persons married under provincial law.
50% ownership of matrimonial property	-amend s. 81(1)(p.2) to grant spouses automatic 50% ownership of matrimonial property upon separation or divorce
Obtain court order for exclusive possession, s. 81(2)	-amend s. 81(1)(p.2) to allow for exclusive possession by one spouse upon divorce or separation
Obtain court order for interim possession, s. 81(2)	-amend s. 81(1)(p.2) to allow for interim possession of rent-to-own matrimonial property by one spouse -court order to decide who will dispose of mortgage
Obtain order for prohibition against sale without consent of spouse, s. 81(2)	-amend s. 81(1)(p.2) to prohibit sale of rent-to-own unit pending divorce or separation without consent of spouse and ensure arrangement for disposal of mortgage
Obtain order for partition of property, s. 81(2)	-amend s. 81(1)(p.2) to allow for partition of rent-to-own matrimonial property upon divorce or separation
Obtain order for sale of real property, s. 81(2)	-amend s. 81(1)(p.2) to allow for sale of rent-to-own matrimonial property and division of proceeds between divorcing or separating spouses
Obtain order for compensation where property sold by spouse, s. 81(2)	-amend s. 81(1)(p.2) to allow for compensation to be paid to spouse where the holder has sold rent-to-own matrimonial property
Order severance of joint tenancy, s. 81(2)	-amend s. 81(1)(p.2) to allow the Band Council to sever joint tenancy for rent-tow-own matrimonial property upon triggering event i.e. court order, separation
Order to restrain spouse from making a gift of property, s. 81(2)	-amend s. 81(1)(p.2) to allow Band Council to restrain spouse from making a gift of rent-to-own matrimonial property contrary to court order
Add new section 81(2) to grant courts jurisdiction to deal with matrimonial rights and remedies	Courts do not have jurisdiction to make orders on matrimonial property similar to those provided in the *Family Relations Act*. A specific amendment granting jurisdiction to superior courts provides a remedy. For Band membership and Indian status an appeal to the courts is allowed in s. 14; for Indian estates on reserves, appeals to the court are allowed for in s. 47.

The Band Council has powers to deal with spousal residency under s. 81(1)(p.2). Some legislative clarification and jurisdiction of Band Councils may require recognition of powers to deal with divorce or separation

[15] *Indian Act*, s. 20, s. 81(1)(p.2), *First Nations Land Management Act*

and its impact on rent-to-own social housing located on custom allotments or traditionally held Band lands.

For certainty, bylaws under this section of the Indian Act can deal with life estates or specified years of occupancy. The new definition of "life estate" under s. 2 will apply. For greater certainty a legislative amendment to s. 81(1)(p.2) can clarify that such Band bylaws are subject to the *Canadian Charter of Rights and Freedoms and to the Canadian Human Rights Act*.

While there is no barrier in the *Indian Act* preventing Band Councils from passing Band bylaws dealing with division of matrimonial property that forms rent-to-own social housing on reserves, such jurisdiction can be made clearer. A legislative amendment may be required to s. 81(1(p.2) to allow Band Councils to grant exclusive possession, a specified term of years of occupancy, interim possession and compensation to the spouse required to leave the home. The Band by-law can deal with which spouse will pay the rent until ownership is achieved. It could also allow the Band to consider whether the children have been provided for in the separation agreement i.e. living arrangement, accommodation.

A new amendment called s. 81(2) can grant superior courts jurisdiction to deal with rights and remedies for spouses upon divorce or separation. Specifying areas of competence for Band Councils under s. 81(2) to mirror the power of the courts would level the playing field for on-reserve spouses. Under a s. 81(1)(p.2) bylaw, when the Land Manager or Administrator has notice of an Order, Judgment, or Declaration, he may do any of the following [s. 66(2), FRA] where spouse is a Member of the Band on whose reserve the matrimonial property is located and the other spouse is a Member of the same Band. A court may be order, judgment or declaration do any of the following where spouses are members of the same First Nation:

(a) Declare the ownership of or right of possession to property;
(b) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division
(c) order sale of property and payment to be made out of the proceeds of the sale to one or both spouses in

specified proportions or amounts [precedent, s. 50, Indian Act];

(d) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family allotments or traditional holdings affected by the divorce or separation;

(e) If property is owned by spouses as joint tenants, sever the joint tenancy.

(f) If the court is satisfied that a spouse has made or intends to make a gift of property to a third person, or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under Band bylaw, the court may restrain the making of a gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse;

(g) restrain a traditional land-holder from disposing of family assets until the other party establishes a claim [s. 67, FRA]. Such an order could include direction as to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party.

(h) provide direction on exclusive or possession of matrimonial property or compensation.

(2) Band Member married to a Member of a different First Nation or to a non-Indian and living in rent-to-own social housing

Social housing that is rented-to-own and occupied by married couples requires that one of the Band member spouses hold land traditionally or by allotment from the Chief and Council. For social housing on Band lands, the house can be rented-to-own but the title remains in the Band. More generally, a parent of a Band member may allocate a "House Lot" for the son or daughter to build a home. This "House Lot" [size established by CMHC) is transferred from the land holder to the Band in exchange for a CMHC mortgage that is used to build social housing. The House Lot remains in the name of the Band until the mortgage is discharged. When the House Lot is transferred

from the holder to the Band for a mortgage it may be held in the name of one spouse and it will be returned in the same designation.

The Band Council has the power under s. 81(1)(p.2) to deal with spousal occupation on reserve land including the rights of non-Band member or non-Indian spouses. While the Band Council can deal with the range of rights and remedies provided under Part 5 of the FRA, this will not resolve the problem for married couples on reserves. Courts must be given the jurisdiction to deal with the disposition of matrimonial property on reserve upon divorce or separation. A new section, s. 81(2), can give jurisdiction to the courts to deal with matrimonial property rights and remedies on reserve including for Band members married to non-Band member Indians or non-Indians.

Upon notice of an Order, Judgment, or Declaration, the Land Manager or Administrator responsible for land and housing on reserve will ensure that one or both parties will discharge the mortgage. The party discharging the mortgage can be the non-Band member or non-Indian spouse. The Order, Judgment, or Declaration will be registered against the title so that when the mortgage is discharged, title will be registered according to it. For example, if the non-Band member or non-Indian spouse keeps the children and the house, the Band by-law will cover who is responsible for discharging the mortgage. The Band by-law will also address the question(s) of exclusive possession or interim possession by a non-Band member or non-Indian spouse. The party disposing of the mortgage will likely get title once the land is returned to the holder of the custom-allotment or traditional land holding if that person disposed of the mortgage. If the non-Band member or non-Indian spouse disposed of the mortgage, he or she can be given a life interest or period of years to occupy the land and home. If there are children/child of the marriage, title can be transferred to the child subject to the life interest of the parent who disposed of the mortgage. The administrative transfer is completed by Band Council Resolution recognizing the new landholder as having a life estate subject to the underlying title going to the children/child of the marriage.

If neither spouse agrees to dispose of the mortgage to the satisfaction of the Band, another Band member can assume the mortgage and eventually get title to the custom

or traditional Lot for that consideration. Consideration for payments already made by the separating or divorced couple can form the basis of an agreement between the Band, the couple and the new mortgagee.

Remedy.

The Band Council has powers to deal with spousal residency under s. 81(1)(p.2) including exclusive possession, interim possession, and registration of a life estate or interest for a period of years by a non-Band member or non-Indian spouse. Some legislative clarification and jurisdiction of courts may be required recognizing their powers to deal with divorce or separation and its impact on rent-to-own social housing located on custom allotments or traditionally held Band lands. It is likely this kind of social housing is located on "House Lots" that are not divisible because of their size—only one house can be accommodated on the Lot.

For certainty, bylaws under this section of the Indian Act can deal with life estates or specified years of occupancy for non-Band member or non-Indian spouses.

While there is no barrier in the Indian Act preventing Band Councils from passing Band bylaws dealing with division of matrimonial property that forms rent-to-own social housing on reserves, such jurisdiction can be made clearer or dealing with non-Band member or non-Indian spouses. A legislative amendment is required to grant superior courts jurisdiction to deal with the range of rights and remedies of spouses who divorce or separate on Indian reserves. A legislative amendment may be required to s. 81(1(p.2) to allow Band Councils to grant exclusive possession, a specified term of years of occupancy, interim possession and compensation to the spouse required to leave the home. The Band by-law can deal with which spouse will pay the rent until ownership is achieved. It could also allow the Band to consider whether the children have been provided for in the separation agreement i.e. living arrangement, accommodation.

Under a new section 81(2), superior courts can be given jurisdiction to issues orders, judgments or declaration to deal with the following:

(a) Declare the ownership of or right of possession to property with a life interest to the non-Band member or non-Indian spouse;
(b) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division
(c) order sale of property if it is larger than a House Lot and payment to be made out of the proceeds of the sale to one or both spouses in specified proportions or amounts [precedent, s. 50, Indian Act];
(d) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child or children of the marriage and take the corresponding action with respect to family allotments or traditional holdings affected by the divorce or separation;
(e) If property is owned by as joint tenants, sever the joint tenancy.
(f) If the court is satisfied that a spouse has made or intends to make a gift of property to a third person, or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under Band bylaw, the court may restrain the making of a gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse;
(g) restrain a traditional land-holder from disposing of family assets until the other party establishes a claim [s. 67, FRA]. Such an order could include direction as to possession, delivery, safekeeping and preservation of a family asset or other property at issue before notice is served on the other party and may order notice be served on the other party.
(h) Order exclusive or interim possession of matrimonial property, and/or compensation to a non-Band member or non-Indian spouse.

Scenario D [Separation Agreement, FRA, s. 56(1)(a)

(1) Band member married to another Band member living in social housing that is not rent-to-own

Both the land and house are owned by the Band. Occupancy is at the discretion of the Band Council and its housing policies.

The Band has the authority under s. 81(1)(p.2) to pass a bylaw dealing with the rights of separated or divorced spouses to remain in a rental social Unit. The bylaw should deal with the rights of children to remain in the home with the custodial parent. Such bylaws can be gender neutral and allow either a male or female custodial parent to remain in the Unit.

The filing of an order, judgment or declaration with the Band, Land Manager, Housing Department or Administrator will likely trigger a review of eligibility to remain in the Band social housing on Band land.

Because the housing unit is Band owned and located on Band land, it would be outside the jurisdiction of the courts to deal with prohibition against sale without consent. The Band is the only body with jurisdiction to sell. Orders for partition and sale are outside the purview of spousal occupants and if they separate or divorce, the Band policy on occupancy will prevail. Interim or exclusive possession upon separation or divorce will be determined by Band policy as the Band is the legal owner of the land and buildings. Compensation for moving out of the rental unit will be governed by Band policy on occupancy.

(2) Band Member married to a non-Band Member or non-Indian living in rent-to-own social housing

Both the land and house are owned by the Band. Occupancy is at the discretion of the Band Council and its housing policies.

If the non-Band member spouse wishes to continue living in Band social housing whether rent is being paid or not, the Band policy will govern. The Band Council could have passed a Band Council Resolution under s. 81(1)(p.2) dealing with spouses living on reserve. The BCR or housing policy would have to also deal with situations where a couple have divorced or separated leaving a non-Band member spouse with or without dependent children of the marriage. Such bylaws can be gender neutral and allow either a male or female spouse to remain in the rental Unit.

Notice of a separation agreement filed by the couple with the Land Manager, Housing Department or Administrator will

likely trigger a review of eligibility to remain in the Band home on Band land.

Because the housing unit is Band owned and located on Band land, it would be outside the jurisdiction of the courts to deal with prohibition against sale without consent. The Band is the only body with jurisdiction to sell. Orders for partition and sale are outside the purview of spousal occupants and if they separate or divorce, the Band policy on occupancy will prevail. Interim or exclusive possession upon separation or divorce will be determined by Band policy as the Band is the legal owner of the land and buildings. Compensation for moving out of the rental unit will be governed by Band policy on occupancy.

Common-Law and Custom Marriages

Under Part V, *Family Relations Act* (RSBC), common-law spouses do not benefit to the same extent as persons married under the laws of the Province. Both heterosexual and gay and lesbian couples who marry under the laws of the province benefit from Part V, although, for certainty, gay and lesbian couples may have to put in place marriage and separation agreements.

For C.P. lands, the playing field would be leveled if "spouses" were defined in the *Indian Act* to mean two persons married under provincial or territorial law. Such spouses are capable of obtaining a "divorce".

For custom allotted or traditional land holdings, the term "spouse" can be defined under s. 81(1)(p.2) to include persons married under provincial or territorial law; common-law spouses who co-habited for at least one or two years; and custom-married couples, those being couples who married under the traditional laws applicable to the Band. The recognition of common-law spouses and custom marriages would be a higher standard than provincial or territorial law if all spouses enjoyed the same rights and remedies provided under provincial law for divorcing and separating couples. Any amendment to s. 81(1)(p.2) or s. 2 dealing with Band bylaw-making powers respecting divorce or separation can be left to the Band's jurisdiction. A definition of "spouse" can originate with each Band provided only that it at least cover persons married under

provincial or territorial law. The Bands then have the benefit of including a broader class at their discretion.

Self Government Policy, Inherent Right to Self Government under s. 35, and Matrimonial Property Rights Including Amendments to the Indian Act

Except for s. 20 lands, matrimonial property on custom allotments or traditionally-held lands fall under the jurisdiction of the Band Councils. They have the power under s. 81(1)(p.1) to make bylaws pertaining to the rights of band members and other persons on the reserve. Under s. 81(1)(p.2), Band Councils may make bylaws providing for the rights of spouses or common-law partners and children who reside with members of the Band on the reserves with respect to any matter in relation to which the council may make bylaws in respect of members of the band.

This paper speaks to the enforceability of the rights of spouses on reserve assuming the Band has passed bylaws under ss. 81(1)(p.1) and (p.2). For specificity, it is advisable to ensure that Band Councils are aware that their bylaws under these sections can provide for rights and remedies for spouses who are divorcing or separating. The range of rights and remedies in a provincial *Family Relations Act* is a good starting point. Band Councils have the right to go further than provincial laws and may include rights and remedies for common-law spouses and custom-married spouses. This approach is not an encroachment on Band powers and jurisdiction; any proposed amendments add specificity to their powers. It is incumbent on Band governments to take responsible action for the benefit of their membership who live in a variety of relationships including marriage under provincial law, common-law and custom. The section to be added is to give courts the jurisdiction to enforce the Band by-laws on matrimonial property rights and provide equitable remedies.

With respect to needed amendments to deal with Certificate of Possession lands, the management of these lands is solely within the Minister's jurisdiction. He has sole discretion. Any amendments to grant courts jurisdiction neither detracts from the Minister's powers, nor the present powers of Band governments. The amendments facilitate separation and divorce for individuals whose matrimonial property is located on an Indian reserve. Allowing courts jurisdiction over matrimonial property held

by C.P. it already outside the purview of Band Councils, and under the control of the Minister. It is incumbent upon him to resolve the vacuum in law for on-reserve divorcing and separating couples. Band governments cannot legitimately claim that any amendment affecting the disposition of C.P. matrimonial property will impact negatively on aboriginal self government. They were denuded of these powers 100 years ago by Parliament.

Conclusion

It is possible for the Minister to amend the *Indian Act* to deal with matrimonial property rights in a way that rectifies the problem by allowing courts jurisdiction and the Minister powers to act upon court orders, declaration or judgments dealing with divorce and separation.

Band powers in this field can be enhanced without forcing a cookie-cutter solution on Band governments. They already have some powers under s. 81(1)(p.1) and (p.2) upon which they may have acted or not acted. Specifics can be added to cover the range of matrimonial property rights and remedies, as well as some amendment to allow courts jurisdiction to make orders, judgments and declarations for the benefit of spouses who are divorcing or separating on Indian reserves.

Any and all of these changes will necessarily be subject to the *Canadian Charter of Rights and Freedoms* and the amended *Canadian Human Rights Act.*

Appendix H

Treaty 8 Alberta First Nations Policy Document Consultation

TREATY 8 FIRST NATIONS OF ALBERTA

FIRST NATIONS CONSULTATION POLICY

MARCH 7, 2005

TREATY 8 POLICY AND PRINCIPLES

PREAMBLE:

The Chiefs and Leaders entered, under their natural law, into Treaty # 8 on the basis of peace and friendship had no basis, capacity, or intention to cede or surrender any of the lands now known as the Treaty 8 Territory within the province of Alberta.

The peoples of Treaty 8 (Alberta) and their respective First Nations governments have never relinquished their role and responsibility as Stewards of these lands.

Treaty 8 First Nations in Alberta and their peoples assert their right to engage in their respective livelihoods collectively over the entire Territory affirmed from the Royal Proclamation of 1763, Treaty 8, the Constitution Act, 1982 and jurisprudence and, will determine their specific interests through internal protocols.

Treaty 8 First Nations in Alberta and their peoples assert that any activity on Crown lands in the Treaty 8 Territory including all regulatory matters require consultation in terms of their impact on Treaty and Aboriginal Rights as affirmed in the Constitution Act, 1982 and their other interests affirmed in jurisprudence.

Treaty 8 First Nations in Alberta and their peoples assert that consultation with their duly authorized officials and bodies is beneficial to their respective First Nations and Alberta.

Treaty 8 First Nations in Alberta and their peoples assert that it is their desire to create greater certainty of environmentally sound and sustainable resource development through a consultation process that is satisfactory to their governments, Alberta.

POLICY STATEMENT:

It is the policy of Treaty 8 First Nations in Alberta and their peoples that:

1. Alberta has the legal duty to consult with Treaty 8 First Nations in Alberta governments where any development on Crown land may impact the asserted rights or interests of Treaty 8 First Nations in Alberta arising from the legal duty that arises whenever the Crown knows or has constructive knowledge of an Aboriginal right or title, and is considering conduct that might adversely affect it.

2. Appropriate mutually acceptable consultation processes with Treaty 8 First Nations in Alberta, well defined with mutually acceptable timelines, need be developed in a timely fashion through the formation of a joint “Consultation Guidelines Table”.

3. Through consultation, Alberta must assess in a mutually agreed regime the potential impact of Crown-sanctioned activities on Treaty 8 Territory with respect to Treaty 8 First Nations in Alberta asserted rights and interests to avoid or minimize such impacts and, where necessary provide other appropriate remedies as is consistent with the laws of Canada.

CONSULTATION PRINCIPLES:

1. Consultation between Alberta and Treaty 8 First Nations in Alberta and their peoples must be meaningful and in good faith.

2. Consultation between Alberta and Treaty 8 First Nations in Alberta and their peoples to insure informed decision making shall occur at the strategic planning stage prior to any form of disposition such as licensing or the granting of permits.

3. The Government of Alberta is responsible for managing the consultation process with respect to Treaty 8 (Alberta) Territories and, in some cases, due to federal law, the federal government will be engaged.

4. Consultation is required between Treaty 8 First Nations (Alberta) Governments and the Government of Alberta with respect to Treaty 8 Territories in Alberta and, where appropriate on specific projects, the project proponent.

5. All parties are expected to provide all available relevant information, with adequate time and capacity to review.

6. The Government of Alberta must make good faith efforts to amend applicable legislative and regulatory timelines to accommodate any meaningful consultation process.

7. Consultation on any activity that involve a number of provincial departments or other orders of government should be integrated as required and organized according to sub-regional integrated resource management planning principles.

CONSULTATION POLICY PRINCIPLES ACKNOWLEDGEMENT:

1. The autonomy of each Treaty 8 First Nation in Alberta must be acknowledged and assured in terms of non-interference with their specific agreements, discussions, and negotiations with Alberta and industry.

2. This policy must acknowledged by Alberta through an appropriate instrument that will assure Treaty 8 First Nations in Alberta that the Government of Alberta affirms, amend or interpret its consultation policy to reflect the Treaty 8 First Nations in Alberta policy in a legally acceptable manner.

3. The Government of Alberta must acknowledge its responsibility to provide the necessary resources to assure the meaningful participation of the Treaty 8 First Nations in Alberta in the consultation process.

TREATY 8 FIRST NATIONS OF ALBERTA

FIRST NATIONS CONSULTATION GUIDELINES FRAMEWORK

June 27, 2005

TREATY 8 FIRST NATIONS OF ALBERTA (T8FNA)

TREATY 8 (ALBERTA) FIRST NATIONS CONSULTATION GUIDELINES FRAMEWORK

1. BASIC PRINCIPLES

The Treaty 8 First Nations of Alberta (T8FNA) Chiefs Consultation Committee and Technical Advisory Group in facilitating the member First Nations interests is bringing forward to the Joint Alberta-Treaty 8 Working Table a Framework that captures the broadest possibilities in achieving honourable, lawful and meaningful consultation with industry and governments with respect to land and resource development in Treaty 8 (Alberta).

1.1 It is an objective of this Framework that meaningful and economically beneficial agreements with industry and governments from land and resource development in Treaty 8 (Alberta) continue and are significantly enhanced with respect to our member First Nations.

1.2 The T8FNA asserts that it is guided in its work by the fact that our efforts within this initiative is First Nation driven and all work must proceed without prejudice to the current and planned efforts of the member First Nations individually and collectively with respect to land and resource development.

1.3 All work undertaken must assure that Treaty and Aboriginal Rights of the member First Nations and their peoples are not abrogated or derogated.

1.4 Appropriate means must be advocated and realized to assure the sustainability of development is maintained through sound means of environmental protection to which member First Nations have involvement and participation including the protection of their traditional use of the lands within the meaning of the law.

1.5 A government to government relationship must be preserved by assuring dialogue is centred around reaching accommodation of a Guideline Framework that represents the interests of the Treaty 8 (Alberta) First Nations and is used to inform Alberta (and Canada and Industry at the appropriate times) in order that they design their governmental instruments to achieve a harmony of interest.

1.6 The Treaty 8 First Nations of Alberta assert that the Crown has an obligation to consult with Treaty 8 First Nations under circumstances where;

1.6.1 the Treaty 8 First Nation asserts livelihood interests within Treaty 8 lands;

1.6.2 the First Nation is seriously pursuing resolution of their claims regarding livelihood interests; and

1.6.3 the Treaty 8 First Nation has presented information to demonstrate, on a prima facie basis, that such a livelihood interest are likely to exist.

2. BASIC CONSULTATION GUIDELINE ELEMENTS

2.1 Acknowledgment of Rights

There must be expressed acknowledgement by the Crown in right of Alberta and third parties that Treaty 8 First Nations (Alberta) have legally identified and adjudicated, and, constitutionally protected rights and interests. Alberta and all relevant third parties must honour and protect the First Nations' rights as the starting point of consultation and overriding goal of the guidelines of the consultation process.

2.2 Provision of Information

First Nations must be provided with all relevant information concerning a proposed decision in a timely manner. They must be fully informed, not just about the details of the proposed decision or action, but about its potential impact on them i.e. what it will mean for the First Nations' lands, peoples, rights, title, traditional use and existing relationships and activities.

The Crown in right of Alberta and third parties have a positive duty to gather and assemble the necessary information and provide it to the First Nations. This will often require commissioning independent studies and/or providing the First Nations with the resources and capacity to undertake the necessary analysis. This must be done at the earliest possible stage.

The information must extend beyond the specific decision or proposal to examine broader, cumulative impacts. Impacts cannot be considered in isolation, but only in the context of ongoing and multiple and cumulative pre-existing impacts already experienced by the First Nations.

The provision of information is only the first critical step in the consultation process. On its own, it cannot satisfy even the most minimal

consultation requirement. First Nations must also have an opportunity to respond, be heard, and express their consent.

2.3 Capacity-building

The First Nations must be provided with the time and resources to enable them to participate effectively for consultation to be meaningful. This requires funding for the hiring of the necessary in-house personnel and external expertise. The First Nations require sufficient resources to enable them to process and respond to applications, to conduct their own analysis, and to engage in meaningful discussions with the Crown and third parties.

Capacity support funding is also required to enable the First Nations to participate and ensure that lands and resources are managed so that resource development is carried out in a sustainable manner including a primary responsibility of preserving healthy lands, resources and ecosystems for present and future generations.

Further, capacity support funding is also required to enable the First Nations to participate in achieving meaningful economic participation with respect to their "livelihood" interests in land and resources.

2.4 Two-way Process

Consultation with the First Nations must be a two-way process. This is beyond the mere provision of information or the communication of decisions after-the-fact. The First Nations must be given an opportunity to express their interests and concerns and have them addressed in a meaningful way.

Problems or concerns identified by the First Nations must be specifically responded to. Suggestions offered by the First Nations cannot be ignored; they must be adopted, or valid reasons for rejection provided.

2.5 Avoiding Impacts

The first goal of consultation must be to avoid impacts on the First Nations' rights and interests. The onus is on the Crown (and third parties, if any) to ensure that all reasonable alternatives that do not negatively impact on Treaty and aboriginal rights have been considered.

2.6 Minimizing Unavoidable Impacts

If some degree of impact is unavoidable, the goal of consultation is to ensure that every possible effort is made to minimize the impact on the First Nations. Again, the onus is on the Crown and third parties to examine all reasonable alternatives and to adopt the approach that impacts

on the First Nations as little as possible. By definition, the First Nations must be directly involved in this process.

2.7 Priority of First Nations' Interests

Minimizing impacts requires that the First Nations' interests be given first priority in relation to the Crown's objectives and the interests of third parties. First Nations priority is required by fiduciary principles. The fiduciary relationship requires that Crown not allow the interests of a third party, or its own interests, to trump its overriding obligations to the First Nations.

2.8 Fair Compensation

Even where impacts are minimized to the greatest extent possible, the First Nations must be provided with compensation for impacts that remain. Consultation is necessary to determine the level and form of compensation.

2.9 First Nations Involvement and Benefit-Sharing

Part of the process of ensuring adequate priority, minimal impact and fair compensation is to ensure that the First Nations are actively involved in decision-making, in the ongoing control and management of projects, and that they share in economic and other benefits. This includes ensuring employment opportunities for First Nations members, as well as revenue-sharing or comparable long term benefits for the First Nations involved. The First Nations must also remain active in any monitoring of the project, to ensure that the requirements of consultation, priority, minimal impact and fair compensation are met on an ongoing basis.

2.10 Dispute Resolution Processes

Dispute resolution processes (DRP) which are mutually determined for resolving conflicts rather than adversarial approaches must be developed and adopted.

2.11 Mitigation, Accommodation and Compensation (MAC) Plan

All efforts to minimize impacts and ensure fair compensation must be set out in a detailed Mitigation, Accommodation and Compensation (MAC) Plan. The MAC Plan must lay out specific commitments in the way of mitigation, accommodation and compensation measures (such as, for example, steps to reduce impacts on wildlife movement and habitat, and commitments to environmental restoration, community enhancement, and employment and job-training).

The MAC Plan will be binding on both the Crown and third parties. The Crown, as fiduciary, has the duty to supervise and enforce compliance with its terms.

2.12 Timing and Consequences

Consultation for the purpose of avoiding and minimizing impacts and accommodating the rights and interests of Treaty 8 First Nations must be completed prior to the decision being made, the action carried out or the authorized activity taking place. Otherwise, the decision can be invalidated.

The duty does not end there. Mitigation and accommodation measures must continue for the duration of the authorized activity; otherwise, both the decision and any action taken pursuant to it are subject to invalidation, and both the Crown and third parties are potentially liable for damages. This could include an accounting of profits.

3. REQUIREMENTS FOR INDUSTRY

Based on the above guidelines, Treaty 8 First Nations (Alberta) will insist on the following terms in their relations with industry:

3.1. A clear written acknowledgment by the company of the Treaty and unextinguished Aboriginal rights of Treaty 8 First Nations.

3.2. Detailed information not only on the specific project proposed, but on the company's short-, medium- and long-range plans in the area. All proposals must be analyzed in relation to existing development, both by the company concerned and others.

3.3. All company documentation must expressly identify the rights and interests of Treaty 8 First Nations. This includes all information provided to shareholders, purchasers, lenders, governments and members of the public. This will put all interested persons on notice that the company's interests are encumbered by the rights and interests of the First Nations. Failure to do so will render the company liable as a constructive trustee.

3.4. Specific commitments to ensure that the affected First Nations are compensated for impacts and losses from the project, and that they share fully in its benefits. This will normally be done through the MAC Plan. These commitments will include but not be limited to matters such as revenue sharing or comparable long term benefits, employment opportunities, capacity funding, trappers' compensation, community enhancement and environmental restoration.

3.5. A written commitment not to proceed with a project until the consultation process and necessary accommodations are complete. This includes the design and implementation of the MAC Plan.

3.6. The company must also acknowledge that its obligations continue for the duration of the project, and must agree to comply with the appropriate DRP if disputes arise as to compliance with the Plan.

4. THREE PHASES OF CONSULTATION

Treaty 8 First Nations in Alberta see the elements of consultation as breaking down into three phases:

4.1 Pre-consultation

This is the information stage, where the Crown and third parties gather and assemble all relevant information and provide it to the First Nations. This includes project-specific information, as well as information regarding impacts on First Nations, including cumulative and multiple impacts. As well as being provided with objective and comprehensive information, First Nations must be given the time and resources to enable them to properly analyze and process it.

4.2 Public Regulatory Processes

In many cases, a given project or decision will be subject to public regulatory processes (such as National Energy Board or Alberta Energy and Utilities Board hearings). These processes do not represent First Nations consultation, since they are not directed to First Nations' issues, interests and concerns. They cannot substitute for a First Nations-specific consultation process.

The First Nations are entitled to take part in these processes, just like other stakeholders and interested parties. However, whether they do so is entirely up to them and this decision is strictly "without prejudice": a decision by Treaty 8 First Nations to participate in an existing public process cannot be seen as adequate First Nations consultation, nor can a refusal to take part be seen as an attempt to frustrate the consultation process.

4.3 First Nations-Specific Processes

. First Nations-specific consultation involves both direct, two-way consultation between First Nations and the Crown; and three-way consultation with First Nations, the Crown and industry. This phase of consultation always involves a positive duty to accommodate the First

Nations' unique rights, interests and concerns. The outcome must meet all legal justification factors, including priority, mitigation and compensation.

Where impacts cannot be avoided entirely, the Crown and First Nations must agree on the necessary mitigation, accommodation and compensation measures. Any third parties will then be brought in to work out the details of implementing these measures through a Mitigation, Accommodation and Compensation (MAC) Plan.

The requirements of Phase 3 consultation are ongoing. First Nations-specific consultation must continue for the duration of the project or activity, as a condition of its ongoing validity. Both the Crown and third parties are bound by their parallel fiduciary obligations to ensure that all legal requirements continue to be met.

5. APPLICATION

The First Nation Consultation Guideline Framework is presented as the basis to advise the Crown and third parties of the assertion and definition of engaging First Nations in Treaty 8 Alberta with respect to land and resources in the Treaty 8 Territory that rests within the borders of the Province of Alberta. It is provided as a basis to enter into government to government discussions to inform Alberta prior to Alberta finalizing its First Nations Consultation Guideline Framework.

It is anticipated that there will be areas of difference within the discussions and the expectation is that all parties will seek, in good faith, create solutions and create the appropriate instrument to foster harmony for all concerned.

It is further anticipated that the sectoral specifics that will be developed following the finalization of Alberta's instrument will also follow the process that has established the government to government joint table methodology utilized in the performance of these tasks.

APPENDICES

APPENDIX 1

"Traditional Use"

The first fundamental question is what government has the legitimate prerogative or authority to define this term?

- The government of Alberta has included a narrow definition of "traditional use" in their First Nation Consultation policy, and this definition is reflected in their "straw dog";
- The Treaty relationship, within which terms such as "traditional use" must be defined, involves the federal Crown government, and a number of contemporary Treaty 8 First Nation Governments;
- The federal Crown government, by executive decision, has affirmed the right of First Nation peoples to govern those matters which are central to their collective identity and integral to their culture;
- Treaty 8 First Nations, in the exercise of their inherent right of self-determination, must define terms which are central to the collective identity of Treaty 8 peoples and integral to their culture.

The second fundamental question about the term, "traditional use," is what does it refer to?

- The government of Alberta has identified these "traditional use" practices in a site specific/use specific manner, and by general reference to limited sustenance hunting, trapping and fishing practices of First Nation peoples;
- The government of Alberta asserts that "traditional use" relationships are not "proprietary" and do not amount to an interest in the land or resources;
- The term "traditional use" is used by First Nation governments to refer to land and resource-use practices which are central to the identity and integral to the culture of Treaty 8 First Nation peoples;
- These land and resource-use practices reflect the spiritual, cultural, political, social and material relationships between Treaty 8 First Nation peoples, and the lands and resources within those areas identified within Treaty No. 8;
- The spiritual, cultural, political, social and material relationships between Treaty 8 peoples and these lands and resources, constitute their 'culture,' and are central aspects of the collective/individual identity of Treaty 8 peoples;
- Land and resource use practices are not static, or frozen in time. They evolve and change within First Nation cultures and societies.

The third fundamental question about the term, "traditional use", relates to how information related to "traditional use" practices can be collected, shared and used as a basis for meaningful consultation between First Nation governments and the government of Alberta?

This question cannot be answered without consideration of the answer to the first two questions; before development of an understanding about Treaty relationships between the Crown and Treaty 8 First Nation governments; the nature of Crown and First Nation rights and interests arising from negotiation of Treaty No. 8, and the Crowns obligation to consult with First Nations which arise from these Treaty relationships.

APPENDIX 2

Treaty Relationships with the Crown & First Nation Interests in Treaty Lands

The Alberta Consultation Policy and draft Guidelines are focused on consultation related to "existing treaty or other constitutional rights." The word "existing" refers to those rights that have been affirmed through Court decisions. The government of Alberta asserts that "existing treaty…rights" do not include any proprietary interest in lands and resources transferred to the province of Alberta under the provisions of the Natural Resources Transfer Act, (1930). This government assertion is based, generally, on the decision of the Supreme Court of Canada, in R. vs. Horseman that it was the intent of the Crown to extinguish the Treaty right to hunt for commercial purpose through passage of the NRTA.

The Treaty 8 First Nations of Alberta assert that the Crown has an obligation to consult with Treaty 8 First Nations under circumstances where;

- **the Treaty 8 First Nation asserts livelihood interests within Treaty 8 lands;**
- **the First Nation is seriously pursuing resolution of their claims regarding livelihood interests; and**
- **the Treaty 8 First Nation has presented information to demonstrate, on a prima facie basis, that such a livelihood interest are likely to exist.**

A number of Treaty 8 First Nations have filed statements before the Courts, asserting that the federal Crown government has failed to fulfill Treaty commitments related to the livelihood interests affirmed by Treaty 8, and that the provincial Crown government has infringed, without justification, the Treaty livelihood rights of Treaty 8 peoples.

Some Treaty 8 First Nations have filed statement of claim with the Specific Claims Branch, of the Department of Indian and Northern Affairs A number of these "specific claims" allege the federal Crown government has not fulfilled Treaty commitments to protect the "usual vocations of hunting, trapping and fishing," provide the Indian peoples with a fair share of lands and resources, and failed to provide them with instrumental support for conduct of livelihood practices.

The Treaty 8 First Nations of Alberta are collectively engaged in bilateral negotiations with the federal Crown government on the matter of Treaty-based governance. One aspect of these bilateral negotiations involves processes for developing a mutual understanding as to the nature and scope of Treaty livelihood rights and interests affirmed by the Crown during negotiation of Treaty 8. A representative of the provincial Ministry of Aboriginal Affairs participates, as an observer, in this bilateral process.

There is a large body of documents and affidavits, collected by the Treaty 8 First Nations,
and by the Crown, to support ongoing review, analysis and resolution of claims related to the nature and scope of First Nation livelihood rights affirmed by Treaty No 8 and the effect of the NRTA upon these livelihood rights. The provincial government and the federal government are aware of this body of information. This body of information is sufficient to challenge the rebuttable presumption of the SCC, (R. vs Horseman), that it

was the intent of the federal Crown to extinguish the commercial interests of Treaty 8 Indians through passage of the NRTA.

R vs. Horseman was a majority decision of four of the seven-member panel. The dissenting opinion, voiced on behalf of the three dissenting Justices of the Supreme Court, opined that;

- the provincial Crown had not presented any evidence to support of this argument,
- the federal government provided no information about the intent of the Crown,
- it would have been a serious breech of trust for the Crown to have unilaterally extinguished the Indian interest acknowledged to have been the fundamental basis for Indian agreement to the Treaty relationship.

The Treaty 8 First Nations have provided the Crown with information to demonstrate that it was the intent of the federal Crown to protect the livelihood interests of Treaty 8 Indians incident to passage of the NRTA, according to a policy, and in a manner similar to those used by the federal Crown within that portion of the Northwest Territories situated north of the provincial boundary. The Treaty 8 First Nations assert that these documented efforts of the federal Ministry of Interior, between 1923 and 1938, to establish a series of Special Reserves as a means of protecting the usual livelihood of identified Treaty 8 Indian Bands, demonstrate that these Treaty 8 Indian livelihood interests were taken seriously by the federal Crown, and that the federal Crown intended these interests be protected by the provisions of paragraph 1 and 2 of the NRTA.

These circumstances are sufficient to demonstrate that each of these Treaty 8 First Nations are seriously pursuing the resolution of claims related to the implementation of the Treaty 8 livelihood commitments. These circumstances provide a basis for demonstration of an obligation for Crown consultation with each of these Treaty 8 First Nations, prior to the resolution of these claims as a means of protecting the honour of the Crown. This obligation is applicable to both the federal Crown, which has the obligation to protect and safeguard these Treaty 8 livelihood interests, and upon the provincial Crown, which took administrative control of lands and resources within provincial boundaries subject to existing arraignments then being established under the provisions of Treaty 8.

We anticipate that a large portion of our ongoing discussions with the federal and provincial government representatives about the need for consultations will be focused on development of guidelines for consultations under these circumstances.

APPENDIX 3

NOTE: Example provided by Lesser Slave Lake Indian Regional Council

Dispute Resolution Processes

The five First Nations acknowledge that there may be times when they cannot agree to the recommendations put forward by CRCC respecting consultation (e.g. overlap issue, etc.) and agree that any disputes will be resolved according to the process set out in this protocol.

The dispute resolution is as follows:

1.1 If a consensus cannot be reached between the Chiefs of the affected First Nation Chiefs or their representatives, then any one of the five First Nations may request that a third party mediator be retained and funded by the CRCC to assist them in resolving the dispute;

1.2 The mediator will attempt to mediate with the First Nations to achieve a mediated settlement to the dispute;

1.3 If there is no mediated settlement, the mediator will provide a brief recommendation to the CRCC;

1.4 The five First Nations will decide by majority vote how the dispute will be settled;

1.5 The mediation and any recommendations of the mediator shall be confidential to the parties to the Dispute unless the parties otherwise agree;

1.6 The costs of the mediator shall be borne in their entirety by the CRCC.

Appendix I

Assembly of First Nations
Resolutions

Assembly of First Nations

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SPECIAL CHIEFS ASSEMBLY
December 5, 6 & 7, 2006, Ottawa, ON

Resolution no. 72/2006

SUBJECT:	**Matrimonial Real Property – Process Concerns**
MOVED BY:	Doug Kelly, Proxy, Kwakwa'Apilt First Nation, BC
SECONDED BY:	Chief Deborah Chief, Brokenhead Ojibway Nation, MB
DECISION:	Passed by AFN Executive on February 5, 2007

WHEREAS the federal government unilaterally developed three legislative options to address matrimonial real property issues on reserves; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on the legislative options for matrimonial real property, notwithstanding that the federal government lacks a specific consultation policy to consult with First Nations on matters affecting our constitutional rights and interests; and

WHEREAS the legislative options proposed by the federal government will adversely impact and infringe the inherent Aboriginal and Treaty rights of First Nations, thereby imposing a legal duty on the Crown to consult with all First Nations whose inherent Aboriginal and Treaty rights may be adversely affected by the federal government's proposed legislative options; and

WHEREAS the federal government has stated its intention to table legislation in 2007 that will regulate matrimonial real property rights on reserve lands; and

WHEREAS First Nations are unanimously concerned that the timeframe proposed by the Minister for consulting with First Nations and for tabling legislation on matrimonial real property issues on reserves is too short and rushed and effectively compromises the ability of First Nations to fulfill our reciprocal duty to engage in the consultation process in an informed manner and does not respect the principle of free, prior and informed consent; and

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WHEREAS First Nations Chiefs lack the capacity and resources to prepare for and participate in consultations with their communities , nor are they in a position to evaluate and make informed decisions about legislative options proposed by the federal government; and

WHEREAS the Crown cannot delegate its legal duty to consult with First Nations to any third party and must consult directly with any First Nation whose inherent Aboriginal or Treaty rights may be adversely impacted by any proposed government action.

THEREFORE BE IT RESOLVED that federal legislated options for Matrimonial Real Property are rejected by First Nations; and

FURTHER BE IT RESOLVED that the Chiefs in Assembly assert that Canada must fulfill the intentions and approaches established in the First Nations - Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments (May 2005) including that the parties agreed to promote meaningful processes for reconciliation and implementation of section 35 rights to improve quality of life and to support policy transformation in any areas of common interest; and

FURTHER BE IT RESOLVED that it is the position of the Chiefs in Assembly that the federal government must engage and finance First Nations to develop meaningful, effective and mutually acceptable community-based consultation and accommodation processes and policy as a prior requirement to the development of any federal legislation; and

FURTHER BE IT RESOLVED that the Chiefs in Assembly direct the federal government to recognize and respect existing First Nations laws and traditions as they pertains to consultation and accommodation; and

FURTHER BE IT RESOLVED that the current process as established by the Government of Canada to deal with the issue of Matrimonial Real property, does not meet the consultation framework established by First Nations and confirmed in the First Nations – Federal Crown Political Accord on the Recognition and Implementation and Implementation of First Nations Governments; and

FURTHER BE IT RESOLVED it is the position of the Chiefs in Assembly that the current process, established by the Government of Canada, must be stopped and re-oriented to fully respect and implement the position of First Nations as confirmed in this resolution; and

FURTHER BE IT RESOLVED it is the position of the Chiefs in Assembly that First Nations' traditional values and community laws can only be defined by First Nations who rightfully hold the rights that are associated with our traditions, our land bases, our inherent rights, our Treaty rights and the collective responsibilities inherently owned by our peoples; and

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Phil Fontaine, National Chief

FINALLY BE IT RESOLVED that the Chiefs in Assembly direct the AFN Executive to bring forward this position to the federal government and engage in discussions with provincial and territorial governments to seek support in opposing the application of provincial laws.

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Phil Fontaine, National Chief

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ANNUAL GENERAL ASSEMBLY
July 11, 12, & 13, 2006, Vancouver, BC

Resolution no. 32/2006

SUBJECT:	**MATRIMONIAL REAL PROPERTY**
MOVED BY:	Grand Chief Doug Kelly, Proxy for Shxw'ow'hamel, BC
SECONDED BY:	Dene National Chief NWT, Noeline Villebrun, Proxy for K'atlodeeche (Hay River Dene) FN, NT
DECISION:	On July 13, 2006, the Co-Chair referred draft resolution numbers 1 to 36 to the AFN Executive Committee for their consideration. On July 31, 2006, at a duly convened meeting, the AFN Executive Committee received and affirmed these draft resolutions.

WHEREAS First Nations have the constitutionally protected inherent Aboriginal and Treaty right to regulate all matters relating to the members of their nations, including the division of matrimonial real property on First Nations lands; and

WHEREAS the legislative gap in respect of matrimonial real property laws on First Nations lands represents an intolerable violation of the human rights of First Nations men, women and children, which has resulted in repeated sanctions against the Government of Canada by the United Nations; and

WHEREAS First Nations, through Special Chiefs Assembly March 2005, agreed on the overall vision of recognizing and implementing First Nations Governments and confirmed the appropriate principles and processes to pursue this objective; and

WHEREAS the First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments signed May 31, 2005 establishes an appropriate process for effecting

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Phil Fontaine, National Chief

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the reconciliation of First Nations and federal Crown jurisdiction over matrimonial real property and joint policy development; and

WHEREAS on June 21, 2006, the Minister of Indian Affairs unilaterally announced a consultation process on matrimonial real property; and

WHEREAS the consultation process developed and proposed by the Department of Indian and Northern Affairs (INAC consists of the following phases:

a) Planning and Development – June to August 2006;
b) Consultations – September 2006 to January 2007;
c) Consensus Building – February to April 2007;
d) Tabling of Legislation – April or May 2007. , and

WHEREAS on May 17, 2006 Conservative MP Brian Pallister tabled Bill C-289, which is a private members bill entitled "An Act to amend the Indian Act (matrimonial real property and immovables", which would extend the application of provincial matrimonial property law to reserve lands; and

WHEREAS the federal government intends to table legislation to regulate matrimonial real property rights on reserve lands in April or May, 2007;

THEREFORE BE IT RESOLVED that the Chiefs in Assembly provide a mandate to the National Chief and the Assembly of First Nations to seek a reconciliation of First Nations and Crown jurisdiction over matrimonial real property on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the National Chief and the Assembly of First Nations to secure resources to ensure a First Nation specific process that includes effective and full participation of First Nations in the development of legislative options on matrimonial real property;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that a Matrimonial Real Property Working Group (MRPWG) be established and consist of members from both the AFN Women's Council and the RIFNG Chiefs and Experts Committee;

BE IT FURTHER RESOLVED that the Assembly of First Nations/National Chief/MRPWG undertake and oversee the following activities:

a) to develop legislative and non-legislative options to achieve a reconciliation of First Nations and federal and provincial Crown jurisdiction;
b) that any legislative and non-legislative options developed achieve an appropriate and respectful balance between the collective and individual rights of First Nations citizens/peoples;

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Phil Fontaine, National Chief

c) to seek clarification from the Government of Canada regarding the potential effect, if any of Bill C-289 on the consultation process.

d) to develop and implement a communications strategy to advance the interests of First Nations in regard to matrimonial real property on the domestic and international fronts;

e) to engage in discussions with First Nations and First Nations citizens on legislative options developed to implement First Nations jurisdiction in respect of matrimonial real property interests on First Nations lands, in accordance with the elements of First Nation policy development established by the Assembly of First Nations including, full national dialogue, regional discussions, and First Nations consent.

BE IT FURTHER RESOLVED that the development of options, both legislative and non-legislative, be effected in accordance with the principles set out in the Political Accord on the Recognition and Implementation of First Nations Governments;

BE IT FURTHER RESOLVED that the Chiefs in Assembly unanimously reject the application of provincial matrimonial real property laws on First Nations lands;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct the Assembly of First Nations/National Chief, as required, to seek additional time to develop legislative options during the Planning Phase of the federal government's proposed consultation process and timeframe;

BE IT FURTHER RESOLVED that the Chiefs in Assembly direct that any proposed legislation be subject to further consultation and the consent of First Nation Governments prior to application.

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Phil Fontaine, National Chief

Appendix J

NWAC/INAC/AFN Matrimonial Real Property Working Group
Guiding Principles

18 October 2006 (as revised on 8 Feb 07)

NWAC/INAC/AFN Matrimonial Real Property Working Group

Guiding Principles

1. Development of MRP Options through Consensus-Building

a) Recognizing there are serious problems raised for First Nation people by unaddressed issues respecting matrimonial real property on reserve under the *Indian Act*, the members of the NWAC/INAC/AFN Matrimonial Real Property Working Group ("MRP Working Group") will participate in a consensus-building process to develop proposed options to address matrimonial real property issues of joint concern.

b) Consensus-building is a process of working together towards a solution that is inclusive of all parties - their perspectives and their needs.

c) Consensus does not necessarily mean unanimity on all issues. There can be different levels of agreement and disagreement among the parties on sub-issues within an overall consensus.

d) The terms "collaborative process" and "joint process" refer to a search for consensus - a process where multiple parties seek common ground on addressing a particular problem or reaching a common goal.

e) The essence of a collaborative problem solving process or a joint process is a search for consensus in a way that respects the perspectives, interests, needs and the decision-making autonomy of each party.

2. Objective

The Native Women's Association of Canada (NWAC), Assembly of First Nations (AFN) and Indian and Northern Affairs Canada (INAC) (hereinafter referred to either as parties or participants), with the assistance of the Ministerial Representative on Matrimonial Real Property, Wendy Grant-John, will work together in a consensus-building process to develop options (legislative and non-legislative) to address matrimonial real property (MRP) issues on First Nations lands.

3. Membership

a) The MRP Working Group is composed of 2 official representatives from each party - the Assembly of First Nations (AFN), the Department of Indian Affairs and Northern Development (DIAND) and the Native Women's Association of Canada (NWAC).

b) Members may send alternates for their members on the MRP Working Group, as required but shall make all reasonable efforts to ensure continuity of representation. Observers can attend at the discretion of each organization.
c) The Ministerial Representative, Wendy Grant-John shall participate in the MRP Working Group as Chair.

4. Consensus-Building Process

The MRP consensus-building process will conclude no later than March 31, 2007 and will involve the following steps:

a) **Agenda Setting:** Agenda setting (allotting meeting time based on joint theme & issue identification);

b) **Legal and Policy Context:** Building shared understanding of issues and perspectives and of the larger legal and policy context (by reviewing the results of the parties' activities relating to MRP including engagement, consultation, dialogue and research);

c) **Interest Identification:** Jointly identifying major themes and the various interests, needs and values underlying themes;

d) **Recommendations and Options:** Jointly exploring recommendations and options (from the parties' activities relating to MRP and other sources, e.g. commissions, Parliamentary committees);

e) **Consensus-Building:** Jointly identifying potential scope of consensus and any areas of disagreement and jointly working on a document of the parties to record areas of consensus and any areas of disagreement.

5. Guiding Principles

The following principles will guide discussions among the Participants during the MRP consensus-building process:

a) **Commitment to building a shared framework of understanding:** Each Participant commits to listen and learn from the other Participants and to respect the perspectives of other Participants, while also striving to understand the perspectives of other Participants.

b) **Commitment to search for inclusive solutions/responses**: Each Participant commits to work towards building a proposed solution / response that aims to meet the needs and interests of all Participants.

c) **Shared responsibility for consensus-building:** A sustainable solution / response (i.e. one that can be implemented) will require each party's support.

6. Role of the Ministerial Representative in Consensus-Building Process

The role of the Ministerial Representative during the MRP consensus-building process will be to:

d) Generally guide the consensus-building process by assisting the Participants to explore and understand each other's values, needs, interests and perspectives with the aim of revealing potential areas of consensus;

e) Assist the Participants in building an agenda for discussion within the time allotted;

f) Guide discussion to focus on constructive inclusive proposals for change;

g) Hold sessions, during the consultation and dialogue phase, between the Participants no less than once a month;

h) Identify potential areas of consensus, and levels of agreement and disagreement within the group and to check the Participants' perception of these; and

i) Prepare and submit a report to the Minister of Indian Affairs and Northern Development on the consensus-building process and recommended next steps, and which may include the following documents as appendices to the report:

    i) The consensus document prepared by the Participants that is referred to at section 4(e); and

    ii) Other reports of Participants may wish to have included.

7. Roles and Mandates of the Participants

Each party has received a mandate supporting its participation in the MRP Working Group and has agreed to participate in a jointly designed consensus-seeking process.

a) Role and Mandate of the AFN

The role and mandate of the AFN in the MRP consensus-building process is to:

i. Work towards the recognition and implementation of First Nations governments, as described in the First Nations-Federal Crown Political Accord, by supporting First Nations jurisdiction over MRP on First Nations lands;

ii. Seek a reconciliation of First Nations and Crown jurisdiction over MRP on First Nations lands; and

iii. Ensure that a respectful balance between the collective and individual rights of First Nations citizens/peoples is achieved in any options put forward.

b) Role and Mandate of NWAC

The role and mandate of NWAC in the MRP consensus-building process is to:

i. Ensure that the unique needs and interests of Aboriginal women are reflected throughout the entire consultation and consensus-building process;

ii. Work towards a respectful balance between the collective and individual human rights of Aboriginal women and the communities they belong to; and

iii. Seek the best possible solution(s) to facilitate meaningful access to matrimonial real property protections for women and their children living on-reserve.

c) Role and Mandate of INAC

The role and mandate of INAC in the MRP consensus-building process is to ensure that:

i. A sustainable solution for the MRP issue on reserve is developed;

ii. Aboriginal people, especially women and children have the same access and benefit of the law for MRP issues that are available for off reserve residents; and

iii. First Nations aspirations are accommodated and incorporated in an MRP solution that respects the relationship between First Nation people and the federal government.

8. Ground Rules for Discussion among the Participants

Discussions among Participants during the MRP consensus-building process will be guided by the following ground rules:

a) **Personal Behavior**: Each Participant shall, without judgement, respect the opinions of the other Participants and their right to express their opinions during the meetings.

b) **Process**: Each Participant will provide a senior spokesperson to attend meetings. The Participants will develop a schedule of meetings.

c) **Reporting and Accountability:** Each Participant will report back to their respective principals in accordance with their own internal reporting processes and mechanisms. The Ministerial Representative will report to the Minister of Indian Affairs in accordance with the terms of her mandate.

d) **Information Sharing:** The Participants commit to share information and issues arising from their research, consultation and dialogue activities respecting matrimonial real property (without precluding any party from seeking confidential legal opinions for themselves on any topic).

e) **Dispute resolution:** The Participants will work toward resolving any disagreements or disputes that may arise during the consensus-building process by utilizing agreed-upon dispute resolution mechanisms. Where the Participants are not able to resolve any disagreements or disputes that arise, the Ministerial Representative will note the respective interests and preferred options of the Participants.

9. Key Issues to be Addressed

a) It is important for parties in the consensus-building process to begin developing an understanding of how each party understands and perceives the major issues of concern to them, and the issues they feel require resolution through this process. This is an important stage of preparation because if the issues are not defined to the satisfaction of one of the parties, then that party will have little motivation to explore consensus on a solution or joint action.

b) The issues that the Participants will address during the MRP consensus-building process include, but are not limited to, the following[1]:

[1] *This list represents the parties' discussions as of 18 October 2006 and is subject to change as the consultation and consensus-building process proceeds*.

DRAFT List of Issues and Policy Linkages

(As of 18 October 2006)

Traditional Knowledge Systems

- Customary and Traditional Approaches to Family
- Customary Approaches to Land
    - How these customary and traditional approaches to land and family are recognized in Canadian law
- Traditional approaches to problem-solving
- Culturally relevant gender-based analysis (GBA) lens

Constitutional and Jurisdictional Issues

- Duty to consult
- Aboriginal and Treaty Rights
- Collective and Individual Rights
- Self-Government
- Sections 35, 35(4), 15, 25, and 28 of the *Constitution Act, I982*
- International Instruments
- *Indian Act*
- *First Nations Land Management Act*
- Indians and lands reserved for Indians, s.91.24
- Federal jurisdiction over marriage and divorce
- Which government has jurisdiction to legislate what?
- Which court can hear cases and enforce orders?

Existing Provincial / Territorial Laws

- Harmonization of laws
- Diversity of provisions regarding ownership, possession and disposition of the matrimonial home during and at termination of marriage or common law relationship
- Diversity of approaches to same sex and common law relationships
- Implications of *Domestic Violence Prevention Act* / *Family Violence Prevention Act*
- Existing provincial/territorial services, like shelters and legal aid
- Wills and estates legislation

Diversity of Land Tenure on Reserve

- Inalienability of reserve lands
- Land tenure regime set up under the *Indian Act* – identify all relevant sections of the *Act* and problems involved, including registration and transfer of interests in reserve land, certificates of possession, custom allotments, no evidence of title issued (NETI), Notice of Entitlement (NE), Location Tickets, Band Certificates of Possession (CPs)

- *First Nations Land Management Act* – consult land / MRP codes passed
- Set-aside lands under self-government agreements
- Land claims settlements
- Emerging and new instruments to promote access to equity for reserve members

Dispute Resolution Processes

- See traditional approaches to problem-solving (above)
- First Nations Institutions and Tribunals
- Conventional Court processes – issues arising, like access to legal services and enforcement of court orders
- Alternative dispute resolution available at community level, or through conventional court systems
- Private ordering, like pre-nuptial agreements, separation agreements etc.

Diversity in First Nations Housing Policies and Residency By-laws

- Different kinds of housing on reserve – band-owned homes, individual-owned homes, rental units, Canada Mortgage and Housing Corporation (CMHC)
- Housing standards and environmental regulations – role played by these in ensuring supply of housing and also stable housing markets
- Treatment of marital breakup in housing policies
- *Indian Act* source of authority to pass residency by-laws
- Treatment of marital breakup in residency by-laws (especially, see below, regarding non-band-members)

Band Membership and Registration

- *Indian Act* provisions, including Bill C-31 and second generation cut-off and relevant INAC administrative rules and practices
- Band by-laws regarding membership – identify sections of *Indian Act* giving power to pass bylaws and conferring rights on non-status persons who have membership conferred by the band
- Take into account particular problematic situations: non-status or non-member reserve residents, non-status or non-member spouses, children who are not status or band members; effect of *Indian Act* requirement to transfer to husband's band, choose band affiliation of children where parents are of different bands

Best Interests of the Child

Child Custody and Support

Child Welfare and Protection

Domestic Violence

- See other topics, i.e. provincial protective legislation; availability of shelters; consider domestic violence protections on reserve, including enforcement capability re orders of exclusive possession

Poverty and Housing

- Particular impacts on First Nations women
- Lack of alternative housing in marital breakup situations
- Occupation of residence by extended family as well as couple
- Financing, insurability and mortgage-ability of reserve lands and interests in reserve lands (relevant re financing buy-out of one spouse by another, protection of residence in violence situations, creating new supply of housing to meet needs)
- Valuation of homes on-reserve
- Title insurance and other innovations
- CMHC and other lending institutions – policies, role
- Housing fund and other strategies

Repeal of s. 67 of *Canadian Human Rights Act (CHRA)*

- Impact on band MRP codes, membership codes, residency by-laws
- Potential to divert resources into complaint resolution or defence
- Raises some of the same issues regarding capacity-building as does MRP

Implementation Issues

- Identifying, sharing, making available best practices
- Avoiding the divisive experience of Bill C-31

Capacity-building for First Nations

- Need for human and financial resources for, e.g., development of MRP codes, systems of decision-making, administration and enforcement of the law
- Developing familiarity with constraints and opportunities of the legal and constitutional environment, i.e. *CHRA*, s. 35(4), Treaties, etc.

Capacity-building for Individuals

- Education on rights
- Access to adequate advice and legal or other services

Capacity of legal and financial systems

- Education of judges and lawyers
- Responsiveness of commercial institutions like banks, mortgage companies etc., or development of First Nations institutions and registry systems