



Matrimonial Real Property on Reserves
Our Lands, Our Families, Our Solutions

First Nations Matrimonial Property Law Resource Handbook



September 2014

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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ABOUT THIS RESOURCE HANDBOOK

This purpose of this Resource Handbook is to provide information to assist First Nations in preparing, drafting and enacting matrimonial property laws, residency bylaws and housing policies to address matrimonial property issues on First Nations lands. This Resource Handbook contains a sample First Nations Matrimonial Property Law based on inherent First Nations jurisdiction and a sample Residency Bylaw. Websites for copies of existing First Nations Housing Policies are also referenced in the endnotes to this Resource Handbook.

The information set out in this Resource Handbook is not intended to be exhaustive of all relevant issues that First Nations must consider when preparing, drafting and enacting laws and policies to address matrimonial property issues on First Nations lands and implementing First Nations jurisdiction over land and family law matters. Nor are the sample laws, bylaws and policies in this Resource Handbook intended to serve as the only model for consideration by First Nations.

Instead, these sample laws, bylaws and policies are merely intended to serve as a starting point for First Nations to consider when asserting and implementing their jurisdiction over land and family law matters on First Nations lands. If a First Nations decides to use these sample laws, bylaws and policies as a starting point, these precedents will obviously have to be adjusted to fit the particular circumstances of each First Nations community and the choices made by members of First Nations communities in respect of the myriad of issues that must be addressed when asserting and implementing First Nations jurisdiction over matrimonial property issues on First Nations lands.

The sample Matrimonial Property Law, Residency Bylaw, housing policies and information contained in this Resource Handbook are not intended to be, nor should they be construed as legal advice or relied upon by any party without first seeking independent legal advice. In other words, no party should act on any information contained in this Resource Handbook without first seeking independent legal advice.

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1.0 INTRODUCTION

First Nations have traditional laws, customs and practices to assist couples in ensuring that spouses and children are adequately cared for when a couple separates or divorces and to provide guidance in determining how any interests that the couple may have in collectively owned First Nations lands will be addressed. The federal government has consistently refused to recognize First Nations laws, customs and practices relating to family law and matrimonial property matters since the *Derrickson* and *Paul* cases were first decided by the Supreme Court of Canada.¹

The *Family Homes on Reserves and Matrimonial Interests or Rights Act (Act)*, however, signals the government's willingness to recognize First Nation's jurisdiction over matrimonial real property laws on First Nations lands. The *Act* applies provisional federal rules on First Nations who have not enacted and implemented their own Matrimonial real property laws under the *Act*, the *First Nations Land Management Act*, or self-government agreements. The provisional rules begin to apply on December 16, 2014.

First Nations may wish to consider developing their own matrimonial property laws, residency bylaws and housing policies to address the immediate needs of families in accordance with principles of self-government. First Nations may also wish to develop their own codes should they find the provisional rules unsatisfactory.

2.0 MATRIMONIAL PROPERTY LAW

This Resource Handbook contains a sample First Nations Matrimonial Property Law at Appendix A. This sample First Nations Matrimonial Property law is based on inherent First Nations jurisdiction. Explanatory notes for the sample First Nations Matrimonial Property Law are set out below.

2.1 PREAMBLES

Preambles can set out the source of authority relied on to enact legislation. Preambles can also provide information regarding the purpose of the legislation and set out guiding principles that will be relied on to guide future interpretation of the law. The Preambles to this sample First Nations Matrimonial Property Law contain provisions that set out:

- the source of authority relied on to enact the sample First Nations Matrimonial Property Law, namely, inherent jurisdiction;
- statements regarding the First Nations laws, traditions, customs and practices incorporated into the sample First Nations Matrimonial Property Law;
- principles to guide the resolution of matrimonial property issues;
- a statement regarding codification of First Nations laws, traditions, customs and practices; and
- governing principles.

The Preambles are described in greater detail below.

- **Inherent Jurisdiction**

As noted previously, this sample First Nations Matrimonial Property law is based on inherent First Nations jurisdiction. The following provisions in the sample First Nations Matrimonial Property law set out the source of authority relied on to enact the sample First Nations Matrimonial Property Law:

Whereas our First Nation has an inherent right of self-government which emanates from its people, culture, land and aboriginal rights [and/or treaty rights] which is recognized and affirmed by Section 35 of the Constitution Act, 1982.

Whereas our First Nation, as an aspect of our inherent right of self-government, has the jurisdiction to address real property issues such as matrimonial property upon the breakdown of marriage and common-law relationships and this inherent right has not been extinguished;

Whereas our First Nation has always been able to resolve issues related to real property matters, including matrimonial property based on our customs, traditions and practices which have evolved over time;

- **First Nations Laws, Traditions, Customs and Practices**

First Nations have traditional laws, customs and practices to assist couples in ensuring that spouses and children are adequately cared for when a couple separates or divorces and to provide guidance in determining how any interests that the couple may have in collectively owned First Nations lands will be addressed.

In addition the Act makes room for these considerations through section 41(2), which requires courts to allow Council to express “cultural, social and legal context” relevant to proceedings before the court.

In the Preamble to the sample First Nations Matrimonial Property Law, First Nations laws, traditions, customs and practices are described as follows:

Whereas our First Nation has historic customs, traditions and practices to resolve matrimonial property issues based on the following core customs:

- *We believe that the families involved with real property on reserve have the authority to resolve matrimonial property issues themselves and our First Nation will respect their decisions.*
- *We believe that if the families cannot resolve their matrimonial property issues our First Nation government, through its Chief and Council, will ensure resolution of the matrimonial property issues based upon governing principles accepted by our First Nation.*

We do not suggest that any First Nation incorporate the above Preambles when describing their laws, traditions, customs and practices. On the contrary, as First Nations laws, traditions, practices and customs vary from region to region and from Nation to Nation, each First Nation will have to describe their own historic laws, traditions customs and practices at this section of the Preambles. The above preamble is merely offered to illustrate possible descriptions of First Nations laws, traditions, customs or practices that First Nations may wish to incorporate into the Preambles of their respective matrimonial property laws.

- **Guiding Principles**

As noted previously, Preambles to legislation often set out principles to guide interpretation of the law. The sample Matrimonial Real Property Law in this Resource Handbook contains the following Preambles to describe the principles which will guide the resolution of matrimonial property issues on First Nations lands:

Whereas our First Nation considers the following historic principles to guide the resolution of matrimonial property issues, which are as follows:

- *We believe that we are not permanent or individual owners of our lands, but that our lands are held in trust for future generations and the collective. We have inherent responsibilities in relation to our lands and all the living creatures on it. In relation to this, individuals may have specific entitlements, but ultimately the benefits of our lands are for the collective.*
- *Our children are our future generation and they have rights to their customs, traditions and practices to be lived out on our traditional territories.*
- *Our government has the responsibility, on behalf of our First Nation, to ensure that the customs, traditions and practices of our nation are respected.*
- *Our conflict resolution principles address individual harm and community harm and look at each of these relationships in a holistic manner.*

Other possible guiding principles, include, but are not limited to the following principles that are set out in a handbook prepared by the AFN for regional dialogue sessions hosted between November 2006 and January 2007:

- *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 their reserve lands.
- *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.
- *Balancing Individual and Collective Rights:* Solutions must achieve an appropriate balance between the individual rights of our members and the collective interests of our peoples on our reserve lands and traditional territories.
- *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 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.

Again, we do not suggest that First Nations incorporate any of the above principles into their Preambles. On the contrary, each First Nation will have to incorporate their own guiding principles at this section of their Preamble.

Many of the principles that will guide the resolution of matrimonial property issues on First Nations lands are already set out in First Nations laws, traditions, customs and practices. 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. Therefore, where new principles are required to address new situations, First Nations community members must be involved in the development of these new principles.

- **Codification of First Nations Laws, Customs, Traditions and Practices**

While First Nations have laws, traditions, customs and practices to address family law and matrimonial property matters on First Nations lands, few of these laws, traditions customs and practices have been codified. Instead, these laws, traditions, customs and practices form an integral part of the fabric and oral traditions of First Nations societies.

The sample Matrimonial Real Property Law in this Resource Handbook contains the following Preamble regarding codification of inherent First Nations laws, customs, traditions and practices:

Whereas our First Nation, with a broad consensus of our Members, agrees to codify the above customs, traditions and practices related to matrimonial property issues and modernize them to our current circumstances.

There has been considerable debate among First Nations about whether to codify First Nations laws, traditions, customs and practices. However the Act requires that First Nation matrimonial property laws must be codified. Nonetheless, it will be up to each First Nation to decide whether to codify its laws, traditions, customs and practices relating to matrimonial property on First Nations lands. The sample language set out above is merely intended to assist those First Nations who have decided to codify their matrimonial property laws, traditions, customs and practices. Such First Nations may wish to consider adopting the language set out in above or similar language to signify their willingness to codify their inherent jurisdiction.

- **Governing Principles**

The sample Matrimonial Real Property Law in this Resource Handbook contains the following Governing Principles:

Whereas the following "Governing Principles" will now apply upon the breakdown of marriage or common-law relationships which address the use, occupancy or possession of matrimonial property on our Reserve lands and the division of interests in that land:

- *We believe that we are not permanent or individual owners of our lands, but that our lands are held in trust for future generations and the collective. We have inherent responsibilities in relation to our lands and all the living creatures on it. In relation to this, individuals may have specific entitlements, but ultimately the benefits of our lands are for the collective.*
- *Any child (children) of the Spouses ending their relationship has the right to reside in the Matrimonial Home until the Child reaches the age of majority, or until other arrangements have been made in the best interests of the Child.*
- *Spouses have the right to determine their affairs by agreement, with the support of their families if necessary, as to the disposition of the Matrimonial Home and interests in First Nation land upon the breakdown of their marriage or common-law relationship, as long as the agreement respects the laws of our First Nation.*
- *Our First Nation Dispute Resolution Process shall be used in cases where an agreement between the Spouses and their families cannot be reached.*
- *Spouses will have access to Mediation or the Community Dispute Resolution Committee to resolve their property rights, entitlements and obligations upon the breakdown of their marriage or common-law relationship, subject to our First Nation laws where their property rights include an Interest in First Nation land.*
- *Chief and Council or its designate has the authority to implement the agreement reached between the Spouses or decision of a Court of Competent Jurisdiction and the Community Dispute Resolution Committee.*

These Governing Principles provide a thumbnail sketch of the framework for regulating the division of matrimonial property on First Nations land that is set out in the sample First Nations Matrimonial Property Law. As this framework is set out throughout the sample law, it is not absolutely essential that they be included in the Preambles. However, it may be useful to include the Governing Principles in the Preambles to provide First Nations community members with an overview of the framework for dividing matrimonial property that will apply to them if they become separated or divorced.

2.2 INTERPRETATION AND APPLICATION

• Interpretation

The *Act* and Sample Code contain several terms with similar definitions, including: Council, Court, First Nations, and Spouse.

The *Act*, however, breaks down interests in property into three categories: “interests or rights,” “matrimonial interests,” and “family home.” While one should examine the *Act* for the exact definitions, these terms are roughly defined as follows:

Family home:

The “**structure**” where spouses habitually reside or have resided. (NOTE this includes only the structure and not land.)

Matrimonial interest or right:

Interests or rights, other than the family home, which were acquired during or in contemplation of the relationship. It also includes interests that were acquired prior to the relationship that appreciated in value.

Interests or rights:

Other interests in reserve land as per the *Indian Act* or *First Nations Land Management Act* (FNLMA).

Section 2 of the sample First Nations Matrimonial Property Law contains definitions for terms commonly used throughout the sample law. These terms include, "child", "spouse," "domestic contract," "dispute resolution committee," "family meeting" "First Nation-financed Family Residence" "matrimonial home." The suggested definitions at Part 1 will have to be modified to reflect important policy decisions made by First Nations communities.

We wish to comment on the definition of "child" and "spouse" set out at Part 1 of the sample First Nations Matrimonial Property Law. The definition of "child" at section 2 "includes a child of either Spouse whether born in or out of wedlock, a legally adopted child (including custom adoptions), who is under the age of eighteen." This is merely a suggested definition for the term "child." The decision about whether to include children born out of wedlock, legally adopted children or children adopted in accordance with First Nation customs in their respective matrimonial property laws will be up to each individual First Nation.

The term "spouse" is defined at section 2 as "a person who is married to another person, whether by a religious or civil ceremony, or a traditional First Nation ceremony, and includes common-law relationships." The definition of spouse at section 2 also includes:

- a) relationships between two individuals of the same sex and opposite sex who are married to each other;
- b) relationships between two individuals not married to each other, of the same sex and opposite sex, who have lived together in a common-law relationship for a period of not less than one year;
- c) in the case of a person asserting the right under this Law as a void or voidable marriage(s) entered into by that person on good faith;
- d) relationships entered into before the Law takes effect; and
- e) former spouses:
 - i. for the purposes of enforcing rights or obligations under a court order or Domestic Contract as defined in this Law; or
 - ii. for asserting rights or obligations under this Law, so long as an application by a former spouse is commenced within one year of the divorce of the spouses."

The decision about whether to include spouses married by religious, civil or traditional ceremonies, common-law relationships or same-sex marriages will be up to each individual First Nation.

Matrimonial real property is the legal term that is used to describe the family home owned by a couple and the land on which it sits. We wish to comment on the following definitions for "interests in First Nation land", "matrimonial home," "First Nation-financed Family Residence" and "Member-financed Family Residence" at section 2 of the sample law, which collectively describe matrimonial property on First Nations lands.

Unlike couples off reserves who typically own both their family home and the land on which it sits, couples on reserves often have different interests in their family home and in land on the reserve where the house is located. There are two types of interests that couples may acquire in reserve lands, namely, Certificates of Possession and custom allotments.

A Certificate of Possession is an interest in land on a reserve set out in the *Indian Act* and evidences the entitlement of the band member named in the certificate to lawful possession of the land described on the certificate.

Custom allotments are allotments of First Nations lands made by bands or band governments to their members in accordance with their own customs and traditions. First Nations who resisted the imposition of individual interests in land on their reserves instead relied on custom allotments to acknowledge individual interests in their lands. Custom allotments may also need to be accommodated in First Nations matrimonial property laws.

Certificates of Possession and custom allotments are both captured within the definition of “interest in First Nation land” at section 2 of the sample law, which includes “any legal or equitable interests held in possession by either Spouse, or both Spouses, in First Nation land.” Only 25-30-% of all band members on reserves own their own homes. The remaining 70-75% of band members rent their homes from the band, the federal government or the Canada Mortgage and Housing Corporation (CMHC) through tenancy or rent-to-own arrangements. The limited interests that most couples enjoy in family homes on reserves must also be accommodated in First Nations matrimonial property laws. This has been accomplished by the definitions for “matrimonial home,” “First Nation-financed Family Residence” and “Member- financed Family Residence” in the sample First Nations Matrimonial Property Law.

- **Application**

Laws often contain provisions that describe the scope of its application. In this case, the geographical scope of the sample First Nations Matrimonial Property law is limited to reserve lands, rather than to the entire traditional territory of an individual First Nation. In particular, section 3 of the sample law states that “[t]his Law applies only to interests in our Reserve lands and not in our First Nation’s traditional territory lands.”

2.3 DOMESTIC CONTRACTS

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. “Domestic contract” is another term that is used to describe both prenuptial and separation agreements.

In the sample Matrimonial Real Property Law, “domestic contract” is defined as:

- a) a “spousal agreement/marriage contract” entered into between Spouses who are married to each other, or intend to marry, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in First Nation land;
- b) a “cohabitation agreement” entered into between the Spouses who are living together in a marriage-like relationship, or in contemplation of living together in a marriage-like relationship, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in First Nation land; and
- c) a “separation agreement” entered into between Spouses who are living separate and apart, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations on separation, with respect the possession or division of interests in First Nation land.

Domestic contracts would be enforceable under sections 10 and 11 of the sample First Nations Matrimonial Property Law, and under section 20 (a) of the Act provided that the agreement is in writing, with free and informed consent and is not unconscionable.

In the Act, domestic contracts are not given a specific section but are reflected as follows:

- a) Agreements can transfer interests in structures or land between First Nations spouses, if (s.31) the agreement is in writing, with free informed consent, and is not unconscionable; and
 - One spouse had interests prior cessation of co-habitation; or
 - Transfer is appropriate because the other spouse holds other such interests in structures and land on reserve.

- b) "Agreements" Will be "considered" in issuing:
 - Exclusive occupation orders—s.20(3)(b)
 - Exclusive occupation orders after death of a spouse—s.21(3)(c)
 - Variation division of matrimonial interests on breakdown of relationship—s.29(g)
 - Variation of post death division of matrimonial interests—s.35

In addition, the Act also sets out that spouses may agree on determination on the value of property upon breakdown of the relationship (s.28(5)) and further that courts may enforce separation agreements on value of property and method of payment, if (s.33) agreement is in writing; not unconscionable; and made with free and informed consent.

2.4 DISPUTE RESOLUTION PROCESSES

For most First Nations, family law and matrimonial property issues are typically resolved through traditional dispute resolution process involving family members, elders or community members.

Consistent with the legal traditions, customs and practices of most First Nations, the sample First Nations Matrimonial Real Property Law provides couples with the option of convening a meeting of family members to assist them in concluding a separation agreement. See the definition of family meeting at section 2 and the provisions relating to a family meeting at sections 15 to 19 of the sample law.

If the couple is unable to conclude a separation agreement with the assistance of family members, the couple can elect to seek the assistance of a mediator. See the definition of mediator at section 2 and provisions relating to the use of a mediator at sections 23 to 37 of the sample law.

Alternatively, the couple can elect to seek the assistance of a First Nations Dispute Resolution Committee to assist them in concluding a separation agreement. See the definition for "Dispute Resolution Committee" at section 2 and the provisions relating to use of this committee at sections 38 to 59 of the sample law. If the couple cannot reach an agreement regarding the division of their property interests, section 50 the sample law authorizes the Dispute Resolution Committee to make final binding decisions.

Decisions of the Dispute Resolution Committee can be appealed to the Chief and Council. However, under section 59 of the sample First Nations Matrimonial Property Law, decisions of the Chief and Council are final and conclusive.

2.5 AMENDING PROCEDURES

All laws must be capable of adapting to changing circumstances. This is usually accomplished through amending procedures. Section 60 of the sample First Nations Matrimonial Property Law sets out an amending procedure that is initiated by a petition signed by at least thirty percent of the members or two thirds of the Council and ratified by a majority of the members of the First Nation at a community meeting.

First Nations may be interested in adopting alternative amendment procedures, which will require modification to the amending procedures set out at section 60 of the sample First Nations Matrimonial Property Law.

In addition, section 7(2) of the Act requires that the First Nation law must contain amending procedures.

2.6 GENERAL PROVISIONS

The sample First Nations Matrimonial Property Law contains general provisions, which authorize the Chief and Council to impose a fine not exceeding \$5,000.00 on any person who contravenes an order of the Dispute Resolution Committee. The general provisions also contain a provision that sets out the date on which the law comes into force and effect.

2.7 ACCESS TO A COURT OF COMPETENT JURISDICTION

The sample First Nations Matrimonial Property Law authorizes couples to refer certain matters in dispute to a Court of Competent Jurisdiction for resolution. Under section 13, a spouse can apply to a Court of Competent Jurisdiction to set aside provisions in a domestic contract relating to an interest in First Nations lands in the following circumstances:

- a) where a Spouse failed to disclose to the other party all of his or her interests in First Nation land, or any material information in respect of those interests;
- b) where a Spouse did not understand the nature or consequences of the provision; or
- c) if otherwise in accordance with the laws of contract.

2.8 RATIFICATION

For First Nations, long-term solutions to matrimonial property issues on First Nations lands must involve community members directly and must come about as an exercise of our inherent right to govern our lands and peoples. 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, the development of solutions must be community-driven and all community members must participate in ratifying their First Nations Matrimonial Property Law.

In addition, section 9 of the Act provides that a code must be ratified by a majority of voters, comprising at least 25% of eligible members.

3.0 RESIDENCY BYLAWS

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.

Section 18(1) of the *Indian Act* provides, in part that “reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart.” Section 28(1) of the *Indian Act* provides that any agreement by which a band or band member purports to permit a non-band member to occupy, use or reside on a reserve is void. Furthermore, 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.² This means that when couples living on a reserve separate or divorce, non-member spouses are no longer entitled to continue residing in the family home on the reserve. However, section 18.1 of the Act interestingly authorizes non-member children to reside on the reserve with custodial parents or guardians who are members of the band.³

Section 81(1) of the *Indian Act* provides band councils with delegated authority to enact by-laws in respect of the entitlement of non-members (including spouses, common-law partners and non-member children) to reside on their reserve lands.⁴ This residency by-law making power can be relied on by First Nations to affirm the provisions of the *Indian Act* that prohibit non-members from residing on the reserve. Alternatively, First Nations can use the section 81(1) by-law making authority to enact residency bylaws that authorize non-member spouses and children to reside on the reserve following marital breakdown. See Appendix B for sample residency bylaw provisions authorizing and prohibiting non-member spouses from residing on First Nations lands.

Of course, advancing these options does not mean that First Nations are advocating the *Indian Act* system as the solution. Rather, on an interim basis the existing legislative framework, although unsatisfactory, is there to provide opportunities for immediate interim measures by the First Nations communities and governments themselves.

Under the Act, a spouse or common-law partner can occupy a family home whether or not that person is a First Nation member during a conjugal relationship and after the conjugal relationship in some cases. For example, section 14 permits non-members to remain in the conjugal home after death of their spouse for a period of 180 days or to seek an emergency protection order for a period up to 90 days under section 16.

4.0 FIRST NATIONS HOUSING POLICIES

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.

Provincial matrimonial real property laws are designed to deal with real property that is owned by couples. However, only 25-30-% of all band members on reserves own their own homes. The remaining 70-75% of band members rent their homes from the band, the federal government or the Canada Mortgage and Housing Corporation (CMHC) through tenancy or rent-to-own arrangements.

Thus, for the overwhelming majority of couples on reserve, the solution to addressing their property interests upon separation or divorce should lie in the development or amendment of

First Nations housing policies.

Many First Nations have successfully addressed matrimonial real property issues in their communities through the development of housing policies. For example, 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."⁵

The *Squamish Nation Housing Policy* similarly contains provisions relating to matrimonial real property issues on reserves. Under this policy, while non-members are required to vacate the family home within three months of dissolution of the marriage to a member, there are special rules for non-member custodial parents or caregivers of minor children or dependent adults. In these circumstances, non-member former spouses are entitled to remain in the family home until the minor children or dependent adults are able to care for themselves or no longer reside with the non-member former spouse.⁶

5.0 FIRST NATIONS 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* (the *Framework Agreement*) between the federal government and First Nations. 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*.

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".

Many First Nations have signed on to the Framework Agreement and have developed land codes. Aboriginal Affairs and Northern Development Canada (AANDC) refers to these First Nations as "operational" First Nations. Additional First Nations have also signed on to the *Framework Agreement*, but have not yet developed their land codes or matrimonial real property codes. AANDC refers to this group of First Nations as the "developmental group."

Additional First Nations wish to sign on to the Framework Agreement and join the developmental group, but remain on a waiting list. AANDC has limited the number of First Nations in the developmental group at one time. Thus, it is only when a First Nation moves from the development group to the organizational group, that a First Nation on the waiting list can be invited to join the developmental group. As it often takes First Nations more than two years to move through the developmental stage, it will take AANDC many years to accommodate all First Nations currently on the waiting list.

6.0 SELF-GOVERNMENT AGREEMENTS

In 1995, the Government of Canada adopted its inherent rights policy, which "...recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*."⁷ The federal government concluded a number of self-government agreements with First Nations throughout Canada pursuant to the inherent rights policy.

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. For example, the Westbank First Nation concluded a self-government agreement with Canada that contains the provisions that recognize the Westbank First Nation's jurisdiction over matrimonial real property on Westbank lands.⁸

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.

APPENDIX A
SAMPLE MATRIMONIAL PROPERTY LAW

MATRIMONIAL REAL PROPERTY LAW²

PREAMBLE

Whereas ___ First Nation has an inherent right of self-government which emanates from its people, culture, language, land and aboriginal rights [*and/or treaty rights - First Nation should name the rights at issue*] which is recognized and affirmed by Section 35 of the *Constitution Act, 1982*.

Whereas our First Nation possess the right of self-determination as recognized in the United Nations Declaration on the Rights of Indigenous Peoples which includes the right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions and to own, use develop and control our lands, territories and resources.

Whereas our First Nation, as an aspect of our inherent right of self-government, has the jurisdiction to address real property issues such as matrimonial property upon the breakdown of marriage and common-law relationships and this inherent right has not been extinguished;

Whereas our First Nation has always been able to resolve issues related to real property matters, including matrimonial property, based on our customs, traditions and practices which have evolved over time;

Whereas our First Nation has historic customs, traditions and practices to resolve matrimonial property issues based upon the following core customs: [*First Nation should insert below its own customs stemming from its historic customs traditions and practices*]:

- *We believe that the families involved with real property on reserve have the authority to resolve matrimonial property issues themselves and our First Nation will respect their decisions.*
- *We believe that, if the families cannot resolve their matrimonial property issues, our First Nation government, through its Chief and Council, will ensure resolution of the matrimonial property issues based upon governing principles accepted by our First Nation.*

Whereas our First Nation considers the following historic principles to guide the resolution of matrimonial property issues, which are as follows: [*First Nation should insert below its own the principles to guide decisions related to matrimonial property*]

- *We believe that we are not permanent or individual owners of our lands, but that our lands are held in trust for future generations and the collective. We have inherent responsibilities in relation to our lands and all the living creatures on it. In relation to this, individuals may have specific entitlements, but ultimately the benefits of our lands are for the collective.*
- *Our children are our future generation and they have rights to their customs, traditions and practices to be lived out on our traditional territories.*
- *Our government has the responsibility, on behalf of our First Nation, to ensure that the customs, traditions and practices of our Nation are respected.*

- *Our conflict resolution principles address individual harm and community harm and look at each of these relationships in a holistic manner with the goal of restoring balance for our Nation.*

Whereas our First Nation, with a broad consensus of our Members, agree to codify the above customs, traditions and practices related to matrimonial real property issues and modernize them to our current circumstances.

Whereas the following “Governing Principles” will now apply upon the breakdown of marriage or common-law relationships which address the use, occupancy or possession of matrimonial real property on our Reserve lands and the division of interests in that land:

- *We believe that our lands are held in trust for our future generations and the collective. We have inherent responsibilities in relation to our lands and all the living creatures on it. In relation to this, individual Members of our First Nation may have specific entitlements, but ultimately the benefits of our lands are for our collective membership.*
- *A Child (children) of the Spouses ending their relationship has the right to reside in the Matrimonial Home until the Child reaches the age of majority, or until other arrangements have been made in the best interests of the Child.*
- *Non-member Spouses and non-member Children will only be entitled to an interest in First Nation land, including the Matrimonial Home, for no greater than a Life Estate. Given their inability to possess a greater interest in First Nation land, they should receive other monetary compensation from the Member Spouse for this loss.¹⁰*
- *Spouses have the right to determine their affairs by agreement, with the support of their families if necessary, as to the disposition of the Matrimonial Home and Interests in First Nation land upon the breakdown of their marriage or common-law relationship, as long as the agreement respects the laws of our First Nation.*
- *Our First Nation dispute resolution process shall be used in cases where an agreement between the Spouses and their families cannot be reached so as to ensure our First Nation laws are respected.*
- *Spouses will have access to our First Nation mediation and/or the Community Dispute Resolution Committee to resolve their property rights, entitlements and obligations upon the breakdown of their marriage or common-law relationship, subject to our First Nation laws where their property rights include an interest in First Nation land.*
- *Chief and Council or their designate has the authority to implement the agreement reached between the Spouses, or the Community Dispute Resolution Committee so long as the agreements and decisions respect our First Nation laws.*

NOW THEREFORE the ___ First Nation hereby enacts the following Law:

PART I - INTERPRETATION AND APPLICATION

Short Title

1. This Law may be cited as "The ___ First Nation Matrimonial Real Property Law".

Interpretation

2. For the purposes of this Law, the following definitions shall apply:

"Broad Consensus" will be reached where a majority of eligible voters who attended a members-at-large meeting voted in favour of the proposed law and where a minimum of at least 25 per cent of the eligible voters participated in the vote.

"Child" includes a child of either Spouse whether born in or out of wedlock or a legally adopted child (including custom adoptions), who is under the age of eighteen;

"Council" means the Chief and Council of our First Nation;

"Court of Competent Jurisdiction" means, in respect of a province, the court referred to in any of paragraphs (a) to (e) of the definition "court" in subsection 2(1) of the *Divorce Act*;

"Dispute Resolution Committee"²³ means a body that is instituted according to our First Nation customs, traditions and practices that will first attempt to get the Spouses to reach a separation agreement, but will make a binding determination of issues related to Interest in First Nation land if an agreement between the Spouses cannot be reached.

"Domestic Contract"¹¹ means:

- a) a "spousal agreement/marriage contract" entered into between Spouses who are married to each other, or intend to marry, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of Interests in First Nation land;
- b) a "cohabitation agreement" entered into between the Spouses who are living together in a marriage-like relationship, or in contemplation of living together in a marriage-like relationship, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of Interests in First Nation land; and
- c) a "separation agreement" entered into between Spouses who are living separate and apart, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations on separation, with respect the possession or division of Interests in First Nation land.

"Eligible Voters" are every person who is 18 years of age or over and a member of the First Nation, whether or not they are resident on the reserve.

"Family Meeting" means a meeting convened with family member(s)¹² of the Spouses chosen by either Spouse who will assist to determine the issues related to Interest in First Nation land.

"First Nation" means ___ First Nation.

“First Nation-financed Family Residence”¹³ means:

- a) “capital housing” is housing paid for by Member(s) occupying a home and for which bank loan(s) may have been obtained or a subsidy from our First Nation. While the Member(s) may own the house, they may be occupying the land under a tenancy agreement with the First Nation to occupy general First Nation land;
- b) “social housing” is a house owned by the First Nation for which Member(s) repay the First Nation and when the house is fully paid off, the First Nation transfers possession of the home to the Member(s); and
- c) “First Nation-owned house” is a house owned by the First Nation and rented by the Member(s) from the First Nation.

“Governing Principles” are set out in the Preamble.

“Immediate family member” includes mother, father, sibling, child and legal guardian.

“Interest in First Nation land” means matrimonial real property, which is any legal or equitable interests held in possession by either Spouse, or both Spouses, in First Nation land.¹⁴

“Life Estate” is the entitlement of a non-member Spouse to certain possessory rights to real property for their lifetime.

“Matrimonial Home” means an Interest in First Nation land 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 or mutually intended by the Spouses to be occupied by one or both of them as the family home whether the home was acquired before or after the date of marriage.¹⁵

“Mediator” means a mediator listed with the Council or its designates.¹⁶ “Member” means a person who is a member of our First Nation [** pursuant to the Indian Act or First Nation’s membership/citizenship code*].

“Member-financed Family Residence” means a home that is fully-owned by Members or does not involve the First Nation for financing and for which the Members hold a certificate of possession for the land.

“Members-at-large Meeting” means a meeting convened to ratify and approve this Law and select the first Dispute Resolution Committee members and approve any major amendments to this Law. And where the First Nation took reasonable measures in accordance with the First Nation’s practices to locate eligible voters and inform them of their right to vote, the means of exercising that right and the content of the proposed laws.

“Reserve” means the * reserve, pursuant to the *Indian Act*.

“Spouse” means a person who is married to another person, whether by a religious or civil ceremony, or a traditional First Nation ceremony, and includes common-law relationships. For greater certainty, the definition of spouse and references to marriage in this Law include:

- a) relationships between two individuals of the same sex and opposite sex who are married to each other;

- b) relationships between two individuals not married to each other, of the same sex and opposite sex, who have lived together in a common-law relationship for a period of not less than one year;
- c) in the case of a person asserting the right under this Law as a void or voidable marriage(s) entered into by that person on good faith;
- d) relationships entered into before the Law takes effect; and
- e) former spouses:
 - i. for the purposes of enforcing rights or obligations under a court order or Domestic Contract as defined in this Law; or
 - ii. for asserting rights or obligations under this Law, so long as an application by a former spouse is commenced within one year of the divorce of the spouses.

Application

- 3. This Law applies only to interests in our Reserve lands and not in our First Nation's traditional territory lands.
- 4. Subject to its terms, this Law shall not be construed as limiting or precluding any right or remedy otherwise available to persons who are or may be affected by it pursuant to any other law that is applicable upon the breakdown of marriage with respect to any other property other than Interests in First Nation land or other entitlements or obligations of Spouses.
- 5. It is the intention of this Law that, subject to its terms, all rights and entitlements and obligations of Spouses are dealt with equitably on the basis of all their respective circumstances, including rights, entitlements and obligations in respect of Interests in First Nation land, including the Matrimonial Home.
- 6. This Law does not apply to an Interest in First Nation land held by either Spouse, or both Spouses, where neither Spouse is a Member. It also does not apply to Spouse(s) excluded by way of a Domestic Contract.
- 7. For greater certainty, a Spouse does not have an election under this Law, on the death of the other Spouse, to claim, take or pursue an Interest in First Nation land held by the other Spouse under this Law. His or her Interest will be determined by the will or administration of the estate of the other Spouse.

PART II - SPOUSES ADDRESS INTEREST IN FIRST NATION LAND BY DOMESTIC CONTRACT OR DOMESTIC CONTRACT WITH THE ASSISTANCE OF FAMILY

A. General

8. It is the purpose and intent of this Law to respect the agreement of Spouses as to the use, possession, occupancy, disposition or partition of an Interest in First Nation land, including an interest that is the Matrimonial Home, so long as the agreement is consistent with the Governing Principles.
9. For the purpose of this Part, Council will prescribe¹⁷:
 - a. rules and procedures applicable to the implementation of these processes, including the delegation of its authority under this Law;
 - b. forms and other documents; and
 - c. fees and costs related to the implementation of the Domestic Contracts;¹⁸ and

B. Domestic Contract

10. A provision in the Domestic Contract that reflects the agreement of the Spouses with respect to an Interest in First Nation land, including an interest that is the Matrimonial Home, is valid, binding and enforceable.
 - (2) Only this provision of the Domestic Contract which sets out the agreement between the Spouses with respect to an Interest in First Nation land, including an interest that is the Matrimonial Home, would need to be provided to the Council upon the breakdown of the relationship to ensure the agreement is implemented pursuant to the laws and polices applicable to our First Nation.
11. A Domestic Contract, or an amendment to or rescission of a Domestic Contract, is enforceable under this Law if it is in writing, signed by both Spouses and witnessed by two other persons.
12. (1) Notwithstanding sections 10 and 11, a provision in a Domestic Contract that would give, award or acknowledge or create an Interest in First Nation land, in favor of a Spouse or Child who is not a Member, that is greater than a Life Estate to occupy or possess an Interest in First Nation land, is void.
 - (2) In applying sub-section 12 (1), a valid Life Estate to possess or occupy an Interest in First Nation land will be measured by the life of the person intended to enjoy it.
13. Subject to this Law, the Community Dispute Resolution Committee may, on application by a Spouse, set aside a provision of a Domestic Contract with respect to an Interest in First Nation land:
 - a. where a Spouse failed to disclose to the other party all of his or her Interests in First Nation land, or any material information in respect of those Interests;
 - b. where a Spouse did not understand the nature or consequences of the provision; or

- c. if otherwise in accordance with the customs, traditions and practices of our First Nation laws.
14. This Part applies whether the Spouses entered into the Domestic Contract on, before or after the date that this Law comes into force and effect.

C. Family Meeting

15. For the purposes of this sub-part, if the Spouses and the family agree, a Family Meeting can be convened, at their cost, to assist the Spouses in concluding a separation agreement.
16. (1) The Family Meeting shall be guided by the Governing Principles.
- (2) If the Matrimonial Home is a First Nation-financed Family Residence, the Spouses must provide notice to Council of their decision to pursue a Family Meeting to settle their Interests in First Nation land and must provide a report of the final outcome within forty-five (45) days of that notice.
17. Where the Family Meeting proceedings are successful, with respect to Interests in First Nation land, a separation agreement shall be concluded. This separation agreement shall prevail so long as it is consistent with the sections 10 to 14 and the Governing Principles.
18. The provisions in the separation agreement with respect to an Interest in First Nation land, including an interest that is the Matrimonial Home, would need to be provided to the Council, or its designate, to ensure the agreement is implemented pursuant to the laws and policies of our First Nation.
19. Where Family Meetings were not successful, there shall be no report required, but simply to advise Council, or its designate, of the result.

PART III DISPUTE RESOLUTION PROCESSES

A. General

20. It is the intention of this Part that the Spouses, who on the breakdown of their relationship or marriage do not have and are unable to conclude a Domestic Contract with respect to Interests in First Nation land pursuant to Part II, will have access to our First Nation dispute resolution processes as follows:
- a. Spouses with a Member-financed Family Residence may seek assistance to conclude a Domestic Contract under any one of the below dispute resolution processes.
 - b. Spouses with First Nation-financed Family Residences shall seek assistance to resolve their dispute under mediation and/or under the Dispute Resolution Committee.
21. For the purpose of this Part, Council will prescribe¹⁹:

- a. rules and procedures applicable to the conduct of the dispute resolution processes, including the delegation of its authority under this Law;
 - b. forms and other documents;
 - c. fees and costs; and
 - d. a roster of Mediators, who are qualified in mediation and will apply the customs, traditions and practices of our First Nation.
22. For greater certainty, nothing in this Part is intended to limit the right of the Spouses to seek other or further alternative dispute resolution on the breakdown of their marriage in relation to any matter other than an Interest in First Nation land, or to limit or restrict the Spouses from otherwise reaching an agreement with respect to an Interest in First Nation land, provided that such agreement results in a separation agreement that meets the requirements of this Law.

B. Mediation

23. It is the purpose and intent of this Law to respect the agreement of Spouses, through the assistance of mediation, as to the use, possession, occupancy, disposition or partition of an Interest in First Nation land, including an interest that is the Matrimonial Home, so long as the agreement reached under mediation is consistent with Part 10 and the Governing Principles.
24. Either Spouse may commence mediation with respect to his or her rights and Interests in First Nation land, by providing notice in the designated form to Council and the other Spouse requesting mediation setting forth the general subject of the dispute.
25. The Spouses shall select a Mediator jointly from a list provided by Council and shall schedule the mediation proceedings.
26. If the Spouses have not agreed upon a Mediator within fourteen (14) days of the initial request to the Council, either Spouse may, in writing, request that the Council appoint one.
27. As soon as possible after a Mediator has been appointed, the Mediator shall meet with the Spouses to explain the mediation process and to provide an initial assessment of the parties' suitability for mediation. This will include a recommendation that the Spouses obtain independent legal advice.
28. The Mediator shall provide initial and ongoing screening with the Spouses as to their suitability for mediation.
29. A Spouse who receives notice of an appointment with a Mediator has a duty to attend the mediation.
30. The Mediator shall proceed expeditiously and use best efforts consistent with our customs and traditions to assist the Spouses in resolving any issues with respect to Interests in First Nation land, including possession of the Matrimonial Home.
31. Subject to sections 21 and 33, promises, conduct and statements, whether written or oral, made in the course of mediation by either Spouse, his or her lawyer or agent, and by

the Mediator are confidential, privileged and inadmissible for any other purpose, including litigation between the Spouses, provided that evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in mediation.

32. For greater certainty, section 31 does not apply in instances where a Mediator must comply with a statutory duty to report if the Mediator obtains information that a Child is in need of protection.
33. Where the mediation is successful, with respect to Interests in First Nation land, an agreement shall be drafted either by the Mediator, or legal counsel, that shall expressly set out the agreed upon terms. The agreement shall also expressly state that each Spouse waives all rights to challenge its provisions as set out in the agreement, subject to section 13. The agreement shall be signed by each Spouse and witnessed by two people and each Spouse shall have a copy of it.
34. An agreement concluded under section 33 shall include a provision for all Interests in First Nation land held by either Spouse, or both Spouses, and shall be a sufficient Domestic Contract for purposes of this Law if it deals with only those interests.
35. Where the mediation was successful, a Mediator shall report that fact to the Council.
36. Where mediation was not successful, the Mediator shall prepare a confidential report to be given to each party and the Council outlining the mediation process. The report will include some or all of the following details:
 - a. The report shall only address whether both Spouses were willing to and did participate in mediation and shall confirm that the mediation did not result in a negotiated agreement between the Spouses; or
 - b. The report shall address whether the Mediator decided that the Spouses were not suitable for mediation.
37. Unless otherwise agreed, each Spouse shall be responsible for an equal share of costs of mediation irrespective of the type of family residence they reside in.

C. Dispute Resolution Committee

38. It is the intention of this sub-part that the Spouses who, on the breakdown of their marriage resolve their dispute with the Dispute Resolution Committee ("Committee") in respect of Interests in First Nation land and possession of the family home.
39. Either Spouse may commence the Committee proceedings with respect to his or her rights and Interests in First Nation land, by providing notice in the designated form to the Chairperson of the Committee and the other Spouse requesting the proceedings setting forth the general subject of the dispute.
40. Unless otherwise agreed, each Spouse shall be responsible for an equal share of costs of the Committee.
41. (1) The Members shall establish at the first Members-at-large Meeting a Dispute Resolution Committee which will consist of six (6) First Nation Members, with two (2) of the six (6) to act as alternates, with knowledge of:

- a. our customs, traditions and practices;
- b. real property rights on our Reserve; and/or
- c. family law and dispute resolution

(2) The Committee will have the power to replace any individual members who have missed three (3) consecutive proceedings with an alternate.

(3) A Committee member will declare a conflict of interest and not participate in a proceeding where he or she is an Immediate family member of a Spouse seeking to address their Interest in First Nation land issues by the Committee.

(4) Any alternate sitting at a formal proceeding or replacing a regular member has full voting power.

(5) In the event a regular member resigns or is terminated under subsection (2), one of the alternates will become a regular member.

(6) The Committee members may remove any other Committee member by resolution and replace him/her by a majority vote in writing with any other suitable individual consistent with section 41(1).

(7) Members of the Committee shall appoint one member who shall be the Chairperson of the proceedings.

- 42. As soon as possible after a Committee has been asked to conduct a formal proceeding, the Chairperson shall meet with the Spouses to explain the Committee process.
- 43. During the proceeding, the Committee will hear from both Spouses and may hear from those who are affected by the breakdown of the marriage; this may include Children of the Spouses if reasonable, or other family members.
- 44. A Spouse has the option to attend Committee proceeding(s) with or without legal counsel.
- 45. A Spouse who receives notice of a Committee proceeding has a duty to attend.
- 46. The Committee shall proceed expeditiously and use best efforts to resolve any issues with respect to Interests in First Nation land and possession of the Matrimonial Home, including making any interim or temporary order of possession of the Matrimonial Home.
- 47. Spouses have the option to first pursue interim or temporary orders of possession of the Matrimonial Home, or an order preventing Spouses from disposing of their Interests in First Nation lands from the Committee, but they may continue to pursue the resolution of all their other disputes through Part II and mediation under this Law.
- 48. Where the Committee proceeding is successful, with respect to Interests in First Nation land, an agreement shall be drafted either by the Chairperson in consultation with the Committee members or legal counsel, that shall expressly set out the agreed upon terms. The agreement shall also expressly state that each Spouse waives all rights to challenge its provisions as set out in the agreement. The agreement shall be signed by each Spouse and witnessed by two people and each Spouse shall have a copy of it.

49. An agreement concluded under section 48 shall include a provision for all Interests in First Nation land held by either Spouse, or both Spouses, and shall be a sufficient Domestic Contract for purposes of this Law if it deals with only those Interests in First Nation land.
50. Where the Committee proceeding is unsuccessful in reaching an agreement between the Spouses, the Committee shall make a final decision and/or order with respect to the Spouses' Interest in First Nation land, for any or all of the following:
- a. an order that an Interest in First Nation land, including the Matrimonial Home, be transferred to a Spouse absolutely, where permitted under this Law;
 - b. an order that either or both Spouses be relocated to other housing accommodations if the Matrimonial Home is a First Nation-owned house;
 - c. an order that an Interest in First Nation land, including the Matrimonial Home, be subject to a lease by one Spouse to the other for a term of years subject to such terms and conditions as the Committee deems just in all the circumstances, but not to exceed a Life Estate for non-members; and,
 - d. an order that an Interest in First Nation land, including the Matrimonial Home, held by both Spouses be partitioned or partitioned and sold.²⁰
51. An order shall not be made under section 50 (a) in favour of a Spouse who is not a Member.
52. Where a proceeding has been commenced under this sub-part, and either Spouse dies before all issues relating to Interest in First Nation land have been disposed of by the Committee, the surviving Spouse may continue the proceeding against the estate of the deceased Spouse.
53. An order or decision of the Committee may be appealed to Council within thirty (30) days from the date that the Committee renders its order or final decision and gives notice thereof.
54. An appeal under this sub-part does not stay the operation of the order or final decision in respect of which the appeal is made.
55. All appeals shall be initiated by notice of appeal in writing in the designated form provided by Council, served upon the Council.
56. (1) Council shall set a date for hearing the appeal which is no later than forty-five (45) days after receiving notice of the appeal.
- (2) Council shall consider the decision and reasons of the Committee and any supporting documentation filed with the Committee during the proceeding.
- (3) Council shall request that the Chairperson of the Committee and the Spouses to the appeal make representations at the hearing.
- (4) During the course of the hearing, the Council may accept any evidence oral or written, which is relevant to the matters at issue.

57. At the conclusion of the hearing, Council may:
- a. grant the appeal,
 - b. deny the appeal, or
 - c. make any other order it deems appropriate in the circumstances.
58. The Council shall render its decision, with reasons, as soon as possible after the hearing, and provide written notice thereof to the Chairperson of the Committee and the Spouses.
59. The decision of the Council shall be final and conclusive.

PART IV - AMENDING PROCEDURES

60. (1) This Law may only undergo major amendments by the consent of the majority of the Members-at-large at a meeting convened by Council for the purpose of amending this Law.
- (2) The amendment shall be initiated by a petition signed by at least thirty (30) percent of the Members or by two thirds (2/3) majority of Council.
- (3) The Council shall provide Members a written notice containing the text of the amendment and the date for the Members-at-large Meeting.
61. This Law may be subject to minor amendment (i.e. typographical errors, renumbering to harmonize with other laws, improvements in the language to clarify the intention of our First Nation, changes in our law to reconcile inconsistencies with other laws and court decisions) by a unanimous decision of Council at a duly convened meeting called for that purpose.

PART V - GENERAL PROVISIONS

62. If any Part, sub-part, section and sub-section of this Law is for any reason held invalid by a decision of a Court of Competent Jurisdiction, the invalid section will be severed from and not affect the remaining provisions of this Law.
63. (1) If a Spouse is found by the Committee to be in contravention of an order or decision of the Committee or Council pursuant to this Law he or she will be found guilty of an offence and liable of a fine not to exceed \$5,000.00.
- (2) A fine payable under this section shall be remitted to our First Nation and payable to the other Spouse.
64. This Law shall come into force and effect on _____, 2014.

**APPENDIX B
SAMPLE RESIDENCY BYLAW PROVISIONS
RELATING TO NON-MEMBERS**

SAMPLE RESIDENCY BYLAW PROVISION PROHIBITING NON-MEMBERS TO RESIDE ON FIRST NATION LANDS

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.²¹

SAMPLE RESIDENCY BYLAW PROVISION PERMITTING NON-MEMBERS TO RESIDE ON FIRST NATION LANDS IN SPECIFIC SITUATIONS

Except as otherwise provided in this By-Law, only a registered band member of the _____ First Nation shall be entitled to reside on the _____ First Nation lands. Persons who are not registered band members of the _____ First Nation shall be entitled to reside on the _____ First Nations lands in the following circumstances:

- a) a child where a registered band member of the _____ First Nation has custody of the child;
- b) the person has custody of a child who is a registered member of the _____ First Nation; and
- c) [other]

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.

ENDNOTES

¹ As a result of Supreme Court of Canada decisions in *Derrickson v. Derrickson*, [1986] 2 C.N.L.R. 45 and *Paul v. Paul*, [1986] 2 C.N.L.R. 74 provincial and territorial matrimonial real property laws do not apply on reserve lands. 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 not done so until now.

² Sections 18(1), 24 and 28(1) are among the many provisions in the *Indian Act* that are designed to ensure that reserve lands are protected from alienation and preserved for the use and benefit of band members only.

³ Section 18.1 of the *Indian Act* provides: "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."

⁴ Section 81(1) of the *Act* provides: "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."

⁵ *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).

⁶ *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).

⁷ The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

⁸ Section 108 of the agreement provides: 108. (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 not discriminate on the basis of sex but may distinguish as between Members and non-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.

⁹ This Law is not suitable for First Nations under the *First Nation Land Management Act* and First Nations under a self-government agreement pursuant to the federal government's self-government policy. Regardless, First Nations should ensure that they seek legal advice and harmonize this template with their First Nation customs, traditions and practices. Moreover, First Nations with particular needs should also modernize their Law to address the specific needs of the community (e.g. housing shortages and over communal housing should be specifically addressed). The First Nation may also wish to blend this Law with their housing and residency laws, as reallocations may be necessary given the new family structure upon the breakdown of the common-law relationship or marriage. Finally, First Nations may wish to address matrimonial real property at a broader Nation level.

¹⁰ The treatment of non-member Spouses and Children is the most crucial aspect of this Law, each First Nation must pay careful attention to addressing this.

¹¹ Also know as an Interspousal Agreement in some provinces.

¹² First Nations should make an adjustment to properly characterize family (i.e. Immediate family and extended family).

¹³ It is important for each First Nation to properly characterize how housing and lands are addressed in your First Nation.

¹⁴ First Nations should properly characterize and define the type of legal and equitable interests that exist on its Reserve (i.e. certificate of possession, certificate of occupation, custom allotments, cottages, leases, etc.). Moreover, it is also important to clearly define the Interests in First Nation land for non-member Spouses and Children.

¹⁵ First Nations with communal housing may wish to amend this provision to create exclusions where there are more than one family occupying the home.

¹⁶ Its designates is provided here so that the First Nation can provide other authorities (i.e. Lands Manager etc.)

¹⁷ It is important that each First Nation develop its rules and procedures at the same time as passing the Law. With respect to forms and costs, Council will need some flexibility to ensure that the community has access to these processes at a suitable cost and efficiency.

¹⁸ There may be no costs, but some First Nations may need only charge nominal fees to ensure the wishes of the Spouses are implemented consistent with the laws and policies of the First Nation.

¹⁹ It is important that each First Nation develop its rules and procedures at the same time as passing the Law. With respect to forms and costs, Council will need some flexibility to ensure that the community has access to these processes at a suitable cost and efficiency.

²⁰ There may be more orders, it will depend on the nature of land title and housing that exists on your reserve. These are just some examples.

²¹ This sample reflects a 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 of 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*.