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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 polices 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 enact a Matrimonial Property Law based on inherent jurisdiction, Residency Bylaw or housing policies or act on any information contained in this Resource Handbook without first seeking independent legal advice.
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1.0 INTRODUCTION

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.\(^1\) 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 or provincial legislation.

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.

However, the federal government recently signalled a willingness to recognize First Nations jurisdiction over matrimonial real property laws on First Nations lands, but will likely impose interim federal rules until First Nations develop their own laws. This shift occurred at the end of a nation-wide process on matrimonial real property conducted by the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians from June 2006 to March 2007.

While this legislation has not yet been introduced in the House of Commons by the Minister, in anticipation of federal legislation to recognize First Nations jurisdiction First Nations may wish to consider developing their own matrimonial property laws, residency bylaws and housing policies to address the immediate needs of families impacted by the federal government’s failure to enact legislation to fill the gap created by the Derrickson and Paul decisions.

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 a2 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;

This sample First Nations Matrimonial Property Law has been developed on the premise that the federal government is willing to honour the provisions of section 35(1) of the Constitution Act, 1982 and Supreme Court of Canada pronouncements regarding the recognition and reconciliation of First Nations and federal Crown jurisdiction now demanded by section 35(1).

Section 35(1) of the Constitution Act, 1982 recognizes and affirms the existing Aboriginal and Treaty rights of First Nations peoples. The Supreme Court of Canada has ruled that reconciliation of the prior existence of First Nations societies and First Nations sovereignty with assumed Crown sovereignty is the purpose underlying section 35(1). This requires reconciliation of First Nations laws, traditions and practices relating to matrimonial property issues on First Nations lands with federal jurisdiction over “Indians and Lands Reserved for Indians” under section 91(24) of the Constitution Act, 1867.

Treaties are instruments that “...serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty...” For Treaty First Nations, their jurisdiction over family law matters is recognized in their Treaties and implementation of their jurisdiction over matrimonial property matters is all that remains to be discussed with the federal Crown.

Where no treaties have been concluded, the Supreme Court of Canada has made it clear that “[t]he potential rights embedded in these claims are protected by section 35...” and directed that the “...honour of the Crown requires that these rights be determined, recognized and protected.” The Supreme Court of Canada added that “[s]ection 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises.”

Thus, where no treaties have been concluded with First Nations, recognition of First Nations Aboriginal rights, including First Nations laws, traditions and practices relating matrimonial property issues on First Nations lands, is now demanded by section 35(1).

There is considerable judicial support for the recognition of First Nations jurisdiction over land and family law matters, including matrimonial property issues on First Nations lands. For example, the courts have confirmed that First Nations have Aboriginal and Treaty rights over our reserve lands and there has been judicial recognition of First Nations jurisdiction over land use on reserve lands. In particular, 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 are arguably protected by section 35(1) of the Constitution Act.
There has also been judicial recognition of traditional First Nations family laws, customs and practices (i.e. adoption and marriage), as well as judicial recognition of First Nations self-government rights by the British Columbia Court of Appeal in the *Campbell* case. There has also 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. The law-making authority of First Nations over family law matters has also been recognized in modern treaties.

By virtue of our Aboriginal title and Treaty rights over our reserve lands together with judicial recognition of our jurisdiction over family law matters, management of our reserve lands and our general right of self-government, First Nations arguably have inherent jurisdiction over matrimonial real property issues on reserves. Furthermore, there has been no extinguishment of these rights through military conquest, occupation or legislative enactment. On the contrary, a unanimous Supreme Court of Canada has confirmed that “Canada’s Aboriginal peoples were here when Europeans came, and were never conquered.”

As noted previously, the federal government has recently expressed a willingness to recognize First Nations jurisdiction over matrimonial property matters on First Nations lands. However, until the federal government actually introduces legislation in the House of Commons, we will not be in a position to confirm the federal government’s willingness to recognize our inherent jurisdiction over matrimonial property matters.

If the federal government decides to not recognize First Nations jurisdiction over matrimonial property matters, then the federal government may challenge any First Nations laws that may be developed or codified using this sample First Nations Matrimonial Real Property Law or any other precedents.

Therefore, before using this sample First Nations Matrimonial Property Law to enact or codify a matrimonial property law based on inherent jurisdiction, we strongly recommend that First Nations seek legal advice regarding possible legal challenges to their jurisdiction over matrimonial property matters and any laws developed or enacted by them in an exercise of their inherent jurisdiction. As part of this analysis, we strongly recommend that First Nations obtain legal advice regarding their ability to satisfy the requirements of legal tests that have been developed by the Supreme Court of Canada to prove the existence of their existing laws, traditions, customs and practices or in regard to existing case law relating to the interpretation of their Treaty rights.

- **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 the Preambles 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 preambles are 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 the Preambles.

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 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. 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.

Decisions about whether to codify traditional laws, customs and practices will not be easy, particularly when the alternative may be imposed federal legislation that fails to provide for recognition and reconciliation of First Nations jurisdiction over matrimonial property matters on First Nations lands.

• **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.

- A Child(s) 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 a Court of Competent Jurisdiction 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

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. The federal government established these interests in
reserve lands in an effort to introduce private property concepts to First Nations peoples. While these individual interests in reserve lands arguably represent an unjustifiable
interference with the Aboriginal and Treaty rights of First Nations, unless challenged, they will
likely have to be accommodated in any First Nations matrimonial property laws.

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 “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;

- 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.

While domestic contracts would be enforceable under sections 9 and 10 of the sample First Nations Matrimonial Property Law, harmonization of First Nations and federal and provincial laws would be required before domestic contracts could be enforced through existing courts of competent jurisdiction.

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 14 to 18 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 22 to 36 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 37 to 50 of the sample law. If the couple cannot reach an agreement regarding the division of their property interests, section 48 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 57 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 58 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 58 of the sample First Nations Matrimonial Property Law.

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 12, 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.

Where spouses are unable to conclude a separation agree to resolve issues in dispute, section 19 of the sample law authorizes spouses with a “Member-financed Family Residence" to make applications to a Court of Competent Jurisdiction for resolution.

Unless the federal government amends the Indian Act or enacts new federal legislation that specifically confers jurisdiction on the federal court to decide matrimonial real property issues on reserves, then provincial courts will likely have jurisdiction to hear applications made pursuant to sections 12 and 19 of the sample First Nations Matrimonial Property Law.

This conclusion is based on a review of sections 92(14) and 101 of the Constitution Act, 1867. Section 92(14) of the Constitution Act, 1867, authorizes the provinces the power to make laws in relation to the “administration of justice in the province.” Section 92(14) confers on the provinces the power to establish and maintain provincial courts with jurisdiction encompassing matters arising under both provincial and federal matters. The provincial superior courts have inherent jurisdiction over matters arising in the provinces.

The Constitution Act, 1867, by section 101, confers on Parliament a power to establish federal courts. Under section 101, Parliament is authorized to establish a system of federal courts to determine cases arising under federal laws for “the better administration of laws of Canada.” Its jurisdiction is confined to those subject matters conferred upon it by the Federal Courts Act or some other federal law. In other words, matters cannot be brought before the Federal Court of Canada unless applications to the federal court are expressly authorized by existing and applicable federal law. This means that the Federal Court, unlike provincial courts, has no inherent jurisdiction.

While the federal Indian Act confers authority on the Federal Court to hear and decide cases over a variety of matters, there is no federal legislation that specifically confers authority on the Federal Court to hear and decide matters relating to the disposition of matrimonial real property on reserves. However, claims involving possession of reserve land have been found to be within the jurisdiction of provincial superior courts. In other words, the courts have found that claims involving possession of reserve land may be brought in the superior court of a province.

Furthermore, the power to decide federal questions does not have to be specifically granted or delegated to the provincial courts by Parliament. If a federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts. This means there would be no requirement for Parliament to expressly confer jurisdiction to a provincial court to deal with matters arising under federal matrimonial real property law.
The foregoing factors support the view that provincial courts would be the Court of Competent Jurisdiction with authority to hear applications made by spouses pursuant to sections 12 and 19 of the sample First Nations Matrimonial Real Property Law, if this sample law is ratified in its present form by a First Nation. Nevertheless, we strongly encourage First Nations to seek legal advice on this question before enacting and ratifying any matrimonial property laws based on the sample law at Appendix A.

2.9 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.

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. 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.

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. 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.

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. In other words, even if the federal government introduced interim federal rules, these rules would not apply to the overwhelming majority of couples on reserves who merely rent their homes.

Thus, for the overwhelming majority of couples on reserve, the solution to addressing their property interests upon separation or divorce will lie in the development or amendment of First Nations housing policies. While First Nations matrimonial property laws are being developed, First Nations housing policies can serve as an interim measure to address the immediate needs of band members who have no legally recognized interest in their family home and the land on which it sits.

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.”

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.

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 14 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”.

Eighteen First Nations have signed on to the Framework Agreement and have developed land codes. The Department of Indian and Northern Affairs Canada (INAC) refers to these eighteen First Nations as “operational” First Nations. Ten of these operational First Nations have also developed matrimonial real property codes under the FNLMA (Beecher Bay First Nation (BC); Georgina Island First Nation (ON); Lheidli T’enneh First Nation (BC); McLeod Lake (BC); Muskoday First Nation (SK); Opaskwayak Cree Nation (MB); Scugog Island First Nation (ON); Westbank First Nation (BC); Whitecap Dakota Nation (SK); and Ts’kwayalakw First Nation (BC)).
An additional 30 First Nations have also signed on to the Framework Agreement, but have not yet developed their land codes or matrimonial real property codes. INAC refers to this group of First Nations as the “developmental group.”

An additional 51 First Nations wish to sign on to the Framework Agreement and join the developmental group, but remain on a waiting list. INAC can only accommodate 30 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, at current rates it will take INAC many years to accommodate the 51 additional First Nations currently on the waiting list.

INAC’s current authority to implement the FNLMA expires in 2008. In other words, unless the federal government allocates more resources to implement the FNLMA and extends its current authority beyond 2008, signing on to the Framework Agreement may not be the most expeditious means of addressing matrimonial real property issues on First Nations lands.

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.” 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.

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.

7.0 Legal Opinions

The AFN obtained legal advice on the question of the federal government’s duty to consult with First Nations on the legislative options set out in Canada’s consultation document prepared for the Minister’s nation-wide process. A summary of this legal opinion is set out at Appendix C.

The AFN also sought advice on the question of whether any possible amendments to sections 18 and 20 of the Indian Act would amount to a breach of any legal or constitutional obligation by the federal Crown. The AFN also sought legal advice on the question of whether the federal government can delegate or assign responsibility to provincial courts to make and enforce orders regarding interim possession of matrimonial real property on reserves. Summaries of these legal opinions are set out at Appendices D and E.
PREAMBLE

Whereas *21 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, 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(s) 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.22

• 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 a Court of Competent Jurisdiction 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, decisions of a Court of Competent Jurisdiction and 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

12. This Law may be cited as "The * First Nation Matrimonial Real Property Law".

Interpretation

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

“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 the Supreme Court of the Province of *;

“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 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”\(^{24}\) 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.

"Family Meeting" means a meeting convened with family member(s)\textsuperscript{25} 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"\textsuperscript{26} 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.\textsuperscript{27}

“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.28

“Mediator” means a mediator listed with the Council or its designates29.

“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. The decisions for these meetings will be based upon a majority of the Members present.

“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:

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

g) 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;

h) 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;

i) relationships entered into before the Law takes effect; and

j) 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

14. This Law applies only to interests in our Reserve lands and not in our First Nation’s traditional territory lands.

15. 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.

16. 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.

17. 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 so Spouse(s) excluded by way of a Domestic Contract.

18. 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

19. 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.

20. For the purpose of this Part, Council will prescribe:\n
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;\textsuperscript{31} and

B. Domestic Contract

21. (1) 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

22. 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.

23. (1) Notwithstanding sections 21 and 22, 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 23 (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.

24. Subject to this Law, a Court of Competent Jurisdiction 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 laws of contract.

25. 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**

26. 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.

27. (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.

28. 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 21 to 25 and the Governing Principles.

29. 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.

30. 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**

31. 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.

32. For the purpose of this Part, Council will prescribe\textsuperscript{32}: 

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.

33. 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

34. 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 21 and the Governing Principles.

35. 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.

36. The Spouses shall select a Mediator jointly from a list provided by Council and shall schedule the mediation proceedings.

37. 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.

38. 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.

39. The Mediator shall provide initial and ongoing screening with the Spouses
as to their suitability for mediation.

40. A Spouse who receives notice of an appointment with a Mediator has a duty to attend the mediation.

41. 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.

42. Subject to sections 32 and 44, 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.

43. For greater certainty, section 42 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.

44. 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 24. The agreement shall be signed by each Spouse and witnessed by two people and each Spouse shall have a copy of it.

45. An agreement concluded under section 42 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.

46. Where the mediation was successful, a Mediator shall report that fact to the Council.

47. 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.

48. 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**

49. 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.

50. 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.

51. Unless otherwise agreed, each Spouse shall be responsible for an equal share of costs of the Committee.

52. (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 52(1).

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

53. 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.

54. 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.

55. A Spouse has the option to attend Committee proceeding(s) with or without legal counsel.

56. A Spouse who receives notice of a Committee proceeding has a duty to attend.

57. 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.

58. 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 of the Committee, but they may continue to pursue the resolution of all their other disputes through Part II and mediation under this Law.

59. 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.

60. An agreement concluded under section 59 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.
61. 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.34

62. An order shall not be made under section 61.a) in favour of a Spouse who is not a Member.

63. 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.

64. 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.

65. 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.

66. All appeals shall be initiated by notice of appeal in writing in the designated form provided by Council, served upon the Council.

67. (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.

68. 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

69. 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 appellant Spouses.

70. The decision of the Council shall be final and conclusive.

PART IV – AMENDING PROCEDURES

71. (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.

72. 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

73. 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.
74. (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.

75. This Law shall come into force and effect on *, 2007.
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.35

SAMPLE RESIDENCY BYLAW PROVISION PERMITTING NON-MEMBERS FROM RESIDING ON FIRST NATION LANDS

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.36
APPENDIX C
SUMMARY OF LEGAL OPINION ON DUTY TO CONSULT

What is the duty of the Federal government to consult on this matter (proposed changes to the law with respect to matrimonial property on reserve)?

- There is a duty on the part of the Crown to consult with First Nations where the Crown is considering changing the law with respect to the division of matrimonial property on reserve upon dissolution of marriages.

- The nature of the duty to consult is grounded in the Crown’s assertion of sovereignty in the face of First Nations’ prior occupation. This gives rise to a requirement for the honour of the Crown to be upheld. The honour of the Crown requires that the Crown, when consulting, act in good faith and in a fair manner. The consultation by the Crown must be meaningful. The Crown’s objective must be to accommodate First Nation interests.

Conclusions in respect of self-government and family law

- Aboriginal rights to self-government have not been extinguished and survive. The nature of the right will vary from First Nation to First Nation and may vary from issue to issue.

- First Nation self-government in some areas of family law, through the adoption of laws or customs, has long been recognized in Canada.

- Family law matters are matters best left to the First Nation group in question and are probably integral to the distinctive culture of various First Nation peoples. There may be some limits on the exercise of the jurisdiction by basic principles of natural justice and good conscience.

- A breach of an Aboriginal or treaty right to self-government must be justified in order to be lawful.

Assuming that there is a Federal duty to consult, does that duty change? In particular is there a change in the Federal duty to consult between the pre-legislative development stage, the legislative text development stage and the implementation stage?

- The duty to consult arises when the Crown is ‘contemplating’ an action that ‘may’ affect a ‘potential’ Aboriginal right or title.

- The duty to consult continues through the various stages giving effect to the infringement.

- The duty to consult will probably vary through the various stages giving rise to the infringement and as the government attempts to accommodate the First Nation perspective. The various stages themselves may be a circumstance giving rise to a changing nature and scope of the duty to consult.

Can the Federal Government assign or delegate its duty to consult to another body such as the AFN?
• The honour of the Crown cannot be delegated and therefore legal responsibility for consultation and accommodation rests with the Crown. While its duty to consult with First Nations people cannot be delegated to arms-length third parties, it may assign procedural aspects of consultation to third parties.

• The determination as to whether First Nation organizations are “third parties” is undecided, however there are strong arguments as to why such a finding would be incorrect and inappropriate.

• Crown consultation with First Nations ‘through’ or ‘via’ First Nation organizations will, at least, be a factor taken into account by courts in determining whether there has been adequate consultation. The topic matter of the consultation will be one of the determining factors, since some matters may be more appropriate for global discussions than others.

• First Nations probably cannot frustrate government attempts to consult via First Nation organizations by refusing to consult. On the other hand, if a First Nation is not a member of a particular organization and the Crown has been so informed, there should be an added duty on the Crown to ensure that First Nation is consulted with in some other fashion.
APPENDIX D
SUMMARY OF LEGAL OPINION ON POSSESSION OF RESERVE LANDS BY NON-MEMBERS

What are the underlying constitutional or legal imperatives behind ss. 18 and 20 of the Indian Act?

- The Royal Proclamation of 1763 confirmed the presence of Aboriginal title (it did not create Aboriginal title) and set out the legal principle that Aboriginal title could not be alienated to anyone except by surrender to the Crown. The Royal Proclamation of 1763 is appended as a schedule to the Constitution Act, 1982 and is expressly referred to in section 25 as part of the Aboriginal rights shielded from any negative impacts of the Charter of Rights and Freedoms.

- The Supreme Court has held that reserve lands are equivalent to Aboriginal title lands. Aboriginal title is collectively held by a First Nation and includes the right to exclusive use and occupation of the land.

- In dealing with the surrender of Indian lands, the Crown has a fiduciary obligation to act in the best interests of First Nations peoples.

- Section 18 of the Indian Act codified the legal principle in the Royal Proclamation and serves to preserve and protect reserve lands.

- One of the purpose of the Indian Act was to encourage individual property rights on reserves by issuing location tickets that granted exclusive right to occupancy and possession (through the issuance of Location Tickets, and later, Certificates of Possession).

- Section 20 of the Indian Act permits the band council to allocate possession of reserve lands to its members and recommend to the Minister the issuance of a Certificate of Possession as evidence of possession.

Can these imperatives preclude the federal government from amending these sections in order to extend rights of interim possession of reserve lands to non-member spouses?

- Any potential amendments to sections 18 or 20 of the Indian Act must be consistent with the constitutional principles set out in the Royal Proclamation of 1763 that Aboriginal title and reserve lands cannot be alienated to anyone except by surrender to the Crown and must be consistent with the section 35 jurisprudence relating to aboriginal title and consultation.

- The effect of a new law that would permit non-member spouses to possess reserve lands could be tantamount to an unlawful surrender of reserve lands and could amount to the extinguishment of an Aboriginal or treaty right. The federal government, through section 35, is prohibited from enacting federal legislation that would extinguish an aboriginal or treaty right.

Would any amendments to ss. 18 and 20 of the Indian Act to permit rights of interim possession to band members, or non-band members, amount to a breach of any legal or constitutional obligation by the federal Crown?
• Legislative amendment that extends possession to non-band members would seriously undermine the historic First Nation-Crown relationship, the underlying scheme of the Indian Act and the fiduciary obligation of the Crown to act in the best interests of Indians in relation to “lands reserved for the Indians” as set out in section 91(24) of the Constitution Act, 1867.

• There is no statutory authority in the Indian Act to transfer the possession of an interest in reserve lands for reasons related to marital breakdown.

• Non-members are specifically prohibited from possessing reserve lands under section 28 of the Indian Act unless otherwise authorized through a permit or lease.

• If non-members are permitted to possess reserve lands and obtain legal remedies upon marital breakdown, it could be argued that such legislative action would infringe constitutionally protected aboriginal title and self-government rights of First Nation peoples. It could also give rise to a claim relating to a breach of the Crown’s fiduciary obligation and the duty to consult.

If federal MRP legislation were to provide remedies for interim possession would these remedies be limited to band members only?

• If the federal government enacts matrimonial real property legislation that provides remedies for interim possession of reserve lands, only band members would be able to access a remedy upon marital breakdown.

• Reserve lands are set aside for the use and benefit of the Band and it is the Band that determines the individual possession of reserve lands for its members.

• Section 28 of the Indian Act prohibits non-members from occupying or possessing rights to reserve lands unless a permit or lease has been authorized by the Minister in accordance with the provisions of the Indian Act.

• In addition, First Nations have always asserted that section 35 of the Constitution Act, 1982 includes the Aboriginal right to self-government. In the matrimonial real property context, it has been argued that First Nations have a right to not only manage, possess and use Indian lands but to make laws regarding the division and possession of matrimonial real property according to its customs and traditions. This means that First Nations could make laws with respect to the possession of reserve lands by band members and non-members. Any federal government legislation, therefore, that would interfere with the exercise of the aboriginal right to self-govern in the area of family law could be susceptible to a court action as infringing section 35 of the Constitution Act, 1982.
APPENDIX E
SUMMARY OF LEGAL OPINION ON ENFORCEMENT ISSUES

Can the federal government delegate or assign responsibility to provincial courts to make and enforce orders regarding interim possession of the matrimonial home on reserves?

- The power to decide federal questions does not have to be specifically granted or delegated to the provincial courts by Parliament.
- The *Constitution Act, 1867*, does not require a separate system of federal courts to decide federal matters. Provincial courts are not confined to deciding cases under provincial laws.
- The general, inherent jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide “federal” matters.
- Therefore, if Parliament enacted a federal law to deal with issues related to matrimonial real property on reserves, the provincial courts would have the jurisdiction to deal with the matters arising from that law.

What legislative action or constitutional amendment, if any, would be required for the federal government to validly delegate responsibility for the enforcement of orders in respect of possession of reserve lands to provincial courts?

- If a federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts. This means there would be no requirement for Parliament to expressly confer jurisdiction to a provincial court to deal with matters arising under federal matrimonial real property law.
- Since Parliament has the power to stipulate the forum of adjudication over matters in relation to which it has legislative competence, it could confer expressly in the federal law that the Federal Court has jurisdiction to deal with matrimonial real property on reserves. Otherwise, as stated above, the provincial courts would have such jurisdiction. But it may be more appropriate for the provincial courts to deal with these matters than the Federal Court in light of their experience and accessibility.
- Questions related to the possession of reserve land does not have to be dealt with by federal laws or in federal courts.
- Although the title of reserve land may be held by the federal Crown, courts have found that bands are in possession of the lands and, therefore, claims involving possession of reserve land have been found to be within the jurisdiction of the provincial superior courts. Moreover, the *Indian Act*\(^1\) permits provincial laws and provincial courts to deal with certain issues related to the possession of reserve land, including expropriation under section 35 of the *Indian Act*.

\(^1\) R.S.C. 1985, c. I-5.
and non-Members for the purpose of determining what type of interest in Westbank Lands may be held by an arbitration following the rules provided in section 271.

c) Any dispute between Canada and Westbank First Nation in respect of this section shall be subject to reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.  The substantive rights which fall within this provision must be defined in light of this purpose: the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation with the sovereignty of the Crown.  More specifically, what s. 35(1) does is to provide the constitutional framework through which the fact that aboriginal lived on the land in distinctive societies, with their own practices, traditions and cultures is acknowledged and lived on reserves, such legislation currently does not apply to reserve lands.

2 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) in the context of the breakdown of the common-law relationship or marriage. Finally, First Nations may wish to
address matrimonial real property at a broader Nation level, like what is being proposed by the Anishinabek Nation.

21 Asterisks are used generically.

22 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.

23 First Nations can choose another group constitution that will work in their community (i.e. Elders’ Committee etc.)

24 Also know as an Interspousal Agreement in some provinces.

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

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

27 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.

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

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

30 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.

31 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.

32 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.

33 The problem with this option is that even if the Committee makes orders or decisions, when a person has a certificate of possession and owns the title to the home, it is possible that they may not respect this decision and insist upon the Indian Act. However, the same is true if a court was asked to address this, it too is limited by the Indian Act and even if a First Nation gave it authority to apply this Law, it may not. If the community is willing to attempt to have a court implement this Law, your First Nation might use similar language adopted by First Nations under the First Nation Land Management Act, an example of which is as follows:

ACCESS TO A COURT OF COMPETENT JURISDICTION

A. GENERAL RULES

37. For the purpose of this Part, “Court of Competent Jurisdiction” and “court” refer to * Superior Court of Justice or specific court of your province.

38. For greater certainty, no court other than a Court of Competent Jurisdiction shall exercise jurisdiction under this Law in respect of Interest in First Nation land.

39. (1) In the event of the breakdown of his or her marriage, a Spouse may apply to a Court of Competent Jurisdiction to determine disputes in relation to Interest in First Nation land provided that he or she has first complied with Part *.

(2) The court shall enquire into the particulars of any mediation, or attempted mediation and may, in appropriate circumstances, direct that the parties participate in mediation with respect to any Interests in First Nation land on such terms and conditions as the court deems fit.
40. Subject to this Law, a Court of Competent Jurisdiction may deal with Interests in First Nation land held by either Spouse, or both Spouses, in manner consistent with the provisions of the *provincial family law* relevant to the ownership, possession or occupancy of real property, the division of interest in real property, and net family property representing the value of interests in real property.

41. Notwithstanding section 40, the fact that an Interest in First Nation land does not include future or contingent Interest in First Nation land shall not be taken to confer jurisdiction upon a court over such Interests under this Law.

42. An Interest in First land received by way of gift or inheritance by one Spouse only from a third person who is a family member, or by one Spouse only together with one or more members of that family, shall be deemed, subject to proof to the contrary, to have family exempt from any claim of the other Spouse, and subject to the intention that the Interest, the income from the Interest and the value of the Interest are to be excluded from the transferee Spouse’s net family property.

43. An Interest in First Nation land received by way of gift or inheritance by one Spouse only from a third person who is a family member, or by one Spouse only together with one or more members of that family, shall be deemed, subject to proof to the contrary, to have family exempt from any claim of the other Spouse, and subject to the intention that the Interest, the income from the Interest and the value of the Interest are to be excluded from the transferee Spouse’s net family property.

44. Notwithstanding section 42, the court may make any appropriate and equitable order on the ground of unconscionability where a Spouse has intentionally, recklessly or fraudulently depleted his or her net family property that is an Interest in First Nation land.

45. Subject to this Law, the court may make any order in relation to Interest in First Nation land held by a Spouse, or by both Spouses, that the court could make in respect of real property situated in the province of *, but not on First Nation land, including, in appropriate circumstances:

(a) an order that an Interest in First Nation land be transferred to a Spouse absolutely, where permitted under this Law,

(b) an order that an Interest in First Nation land be subject to a lease by one Spouse to the other for a term of years subject to such terms and conditions as the court deems just in all the circumstances;

(c) an order that an Interest in First Nation land held by both Spouses partitioned or partitioned and sold.

46. An order shall not be made under section 45 (a) in favour or a Spouse who is not a Member.

47. Where an order is made under section 45 (c), the *appropriate authority* of our First Nation may make provision for a survey and for the allocation of the costs of the transactions unless the court has already made an order to that effect.

48. Subject to this Law, a Spouse may apply to the court for determination of a question between him or her and his or her Spouse in relation to the right to possession of an Interest in First Nation land, and the court may make:

(a) an order declaring the right of possession to the Interest in First Nation land, and

(b) any order that could be made under section 46 in respect of that Interest in First Nation land.

49. Where the Interest of a Spouse in First Nation lands is held through a corporation, the court may order that he or she transfer shares in the corporation to the other Spouse or have the corporation issue shares in the corporation to the other Spouse.
50. An order shall not be made under this Part so as to require the sale of an operating business or farm on First Nation land, or so as to impair seriously its operation, unless there is no reasonable alternative method of achieving an equitable result between the parties.

51. Where a proceeding has been commenced under this Part, and either Spouses dies before all issues relating to Interest in First Nation land have been disposed of by the court, the surviving Spouse may continue the proceeding against the estate of the deceased Spouse.

52. For greater certainty, a “Spouse” for the purpose of applying for relief from a court includes a former Spouse after the marriage has been dissolved by decree absolute of divorce or by judgment of nullity.

53. Nothing in this Law relieves a party of the requirement to observe the rules and procedures of a Court of Competent Jurisdiction in relation to matrimonial causes.

54. Nothing in this Law limits the application of valid law of *province and Canada in respect of matrimonial causes, except to the extent that such law deal expressly or implicitly with Interests in First Nation land and to that extent this Law applies.

55. It is the intention of this Law that all rights, entitlements and obligations of Spouses be dealt with equitably on the basis of the totality of their circumstances, including rights, entitlements and obligations in respect of Interests in First Nation land, but subject to the special provisions set out in this Law.

B. MATRIMONIAL HOME

56. Whether or not an Interest in First Nation land is a Matrimonial Home is a question of fact and, for greater certainty, the provisions of the *provincial family law legislation dealing with the designation of a Matrimonial Home do not apply in respect of Interest in First Nation land.

57. Subject to the limitation inherent in the nature of First Nation land, both Spouses have an equal right to possession of a Matrimonial Home.

58. When only one Spouse holds an Interest in First Nation land that is a Matrimonial Home, the other Spouse’s right of possession is:

(a) personal against the Spouse who holds the Interest; and

(b) ends when they cease to be Spouses, unless a Domestic Contract of court order provides otherwise.

59. No Spouse shall dispose of or encumber an Interest in First Nation land that is a Matrimonial Home unless:

(a) the other Spouse joins in the instrument or consents to the transaction;

(b) the other Spouse has released all rights in respect of that Interest by Domestic Contract; or

(c) a court order has authorized the transaction or has released the Interest in First Nation land from the application or this section.

60. If a Spouse disposes of or encumbers an Interest in First Nation land that is a Matrimonial Home in contravention of section 59, the transaction may be set aside on an application to the court,
unless the person holding the Interest or encumbrance at the time of the application acquired it for value, in good faith and without notice that the property was a Matrimonial Home at the time of acquiring it or making an agreement to acquire it.

61. When a person proceeds to realize upon an encumbrance or execution against an Interest in First Nation land that is a Matrimonial Home, the Spouse who has a right of possession under section 59 has the same right of redemption or relief against forfeiture as the other Spouse and is entitled to the same notice respecting the claim and its enforcement of realization.

62. The court, on the application of a Spouse or a person claiming an Interest in First Nation land that is a Matrimonial Home, may:

(a) make a declaration whether or not the Interest in First Nation land is a Matrimonial Home;

(b) authorize a disposition or encumbrance of the Interest in First Nation land, provided that such disposition or encumbrance is otherwise under First Nation law, if the court finds that the Spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the court may prescribe conditions including the provision of other comparable accommodation, or payment in place of it, that the court considers appropriate;

(c) dispense with a notice required to be given under section 58;

(d) make an order under section 51, subject to such terms and conditions as the court determines to be equitable and just in all the circumstances.

63 Regardless of which Spouse holds an Interest in First Nations land that is a Matrimonial Home, the court may on application:

(a) order the delivering up, safekeeping and preservation of the Interest in First Nation land that is a Matrimonial Home;

(b) direct that one Spouse be given exclusive possession, consistent with this Law, of the Interest in First Nation land that is a Matrimonial Home, or part of it for such period as the court may direct, and release any other Interest in First Nation land that is a Matrimonial Home from the application of this Part;

(c) authorize a disposition or encumbrance consistent with First Nation law of a Spouse’s Interest in First Nation land that is a Matrimonial Home, subject to the other Spouse’s right of exclusive possession as ordered;

(d) where it appears that a Spouse has disposed of or encumbered an Interest in First Nation land that is a Matrimonial Home in a fraudulent manner calculated to defeat the rights of the other Spouse under this Law, or has falsely and knowingly represented in connection with a disposition encumbrance that the Interest in First Nation land is not a Matrimonial Home, direct the other Spouse to substitute other Interests he or she holds in First Nation land for the Matrimonial Home subject to such conditions as the court considers appropriate;

(e) make any interim or temporary order to give effect to the purpose of this Law or to protect the rights of a Spouse; or

(f) make any ancillary order which the court deems necessary to give effect to this Law.
64. A court, in considering whether to direct that one Spouse have exclusive possession of an Interest in First Nation land that is a Matrimonial Home, shall be guided by the principle that the custodial parent of a Child should, if he or she requests it, have exclusive possession of the family residence for a period sufficient to ensure that the Child, or the youngest Child if there is more than one Child, reaches the age of majority and has the opportunity to complete his or her education, provided that observance of this principle is consistent with the best interest of the Child.

65. Where both parents share joint custody of a Child or Children, the principle set out in section 64 shall be adapted to favour the Spouse with whom the Child or Children principally reside, and if the Child or Children reside substantially equal periods of time with both Spouses, then the principle shall be neutral as between them.

66. In applying the principles set out in section 65, the court may have regard to the fact that one or more of the Children are not Members.

34 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.

35 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.

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